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THE INSTITUTES OF ENGLISH PUBLIC LAW:

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PUBLIC INTERNATIONAL LAW;
AND THE
PUBLIC MUNICIPAL LAW OF ENGLAND.

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Agréez, Monsieur, mes félicitations avec l'assurance de mes sentiments les plus distingués.

A. THIERS.

THOMAS CARLYLE, Esq.

(Rector of the University of Edinburgh.)

DEAR SIR,—I have more than once looked into your Map of the History of England, and can now, since you request it, have no hesitation in saying, what is strictly the truth, that, were I a schoolmaster, teaching young people English History, I would de-

cidedly procure myself a copy of that Map and hang it up, where it should be continually conspicuous and legible to all my pupils.

Yours sincerely,

T. CARLYLE.

5, Great Cheyne Road, Chelsea,

Oct. 22, 1867.

LONDON: GEORGE PHILIP & SON, 32, FLEET STREET.

BOOK II.—THINGS.

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THE INSTITUTES
OF
ENGLISH PRIVATE LAW:

EMBRACING AN OUTLINE OF

THE SUBSTANTIVE BRANCH OF THE LAW

OF

PERSONS AND THINGS.

BY

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AUTHOR OF THE INSTITUTES OF ENGLISH PUBLIC LAW;

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JOINT-TRANSLATOR OF ORTOLAN'S HISTORY OF ROMAN LAW

IN TWO BOOKS.

BOOK II. — THINGS.



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INSTITUTES
OF
ENGLISH PRIVATE LAW.

BOOK II.

CHAPTER I.

THINGS: THEIR ORIGIN, CHARACTER, AND INCIDENTS.

THINGS are either *natural* or *artificial*. When thus used in antithesis to the term 'natural,' the word 'artificial' imports two distinct classes of things—viz., those created immediately by the law, and those created by it mediately through individuals. It is with things *artificial*, the word being used in this sense, that the law is mainly concerned; for the first act of the law—if we may so express ourselves—when finding or coming in contact with any natural object, is to subjugate it, to take it out of the sphere of the *natural*, to place it within the pale of the *legal*, to label or to name it, and to assign to it legal attributes. The lawyer, as lawyer, does not regard the field, the horse, or the heir-loom, as a thing of beauty or of pleasure, but as a subject of property, of which its peculiar characteristics are mere incidents. His attention is

centered upon the means of acquiring legal interests in it, upon determining and defining what those interests are, and upon ascertaining in what way or ways they may be alienated or lost. As the merchant regards origin and quality solely as matters of value, so the lawyer considers them as mere elements of rights, duties, and obligations.

Whether natural or artificial, every thing is necessarily either *corporeal* or *incorporeal*. Things 'corporeal' are such tangible things as are the objects of sense—things that may be seen or handled. Things 'incorporeal' are such intangible things as originate and exist solely in the mind—they are estates or interests in things corporeal, rights in and to, and the duties or obligations attaching to, such interests.

Things incorporeal, therefore, are mainly, if not entirely, things artificial—*i.e.*, pure creations of the law.

The object of these remarks is to establish in the mind of the reader the fact of the broad distinction between material objects themselves, whatever be their nature, and the legal incidents of such objects.

As everything is either natural or artificial, corporeal or incorporeal, so must it also be either *moveable* or *immoveable*, and that whether as a natural or a legal attribute. Land is said to be *immoveable*, for though portions of the land may be removed, it is obvious that the land itself cannot. As a purely legal attribute, not merely is the land *itself* immoveable, but *all things* which, though in their nature *moveable*, are so incorporated with the land as in the contemplation of law to become a part of it, are also said to be *immoveable*; for it is a legal theory that whatever is

planted in or upon the land, is ceded to the land—*Quicquid plantatur solo, solo cedit.*

In addition to the division of things into *natural* or *artificial*, *corporeal* or *incorporeal*, *moveable* or *immoveable*, all things are distributed by the law amongst three classes—viz., things *real*, things *personal*, and things *mixed*. For the moment we may satisfy ourselves by saying that the term ‘things real’ signifies all permanent and immoveable objects; that the term ‘things personal’ embraces two classes of things—viz., ‘chattels real,’ and ‘chattels personal’; that a ‘chattel real’ is an inferior interest in a thing real; a ‘chattel personal,’ anything which, in ancient times, did not concern the realty, but which in some way was connected with, or was capable of accompanying, the person; and that ‘things mixed’ are such as partake in part of the character of things *real*, and in part of that of things *personal*.

Origin.—Concerning the origin of things, but little need be said. We have already, when treating of the nature of things, had occasion to comment upon the distinction between their natural and their legal origin. It is sufficient here to say that, except so far as the natural origin of a thing gives to it natural incidents that cannot be ignored by the law, which we will consider shortly, the fact of *natural*, as distinguished from *legal* origin, is utterly immaterial to the lawyer; or, speaking with greater precision, it is a matter of no moment to him whence the thing came, or in what region it dwelt before it fell into *dominium*, which may be said to be the date of its *legal*, as distinguished from its *natural*, birth.

If we use the word ‘things’ in so broad a sense as to include, not merely things properly so called, but

also *rights*, *duties*, and *obligations*—for it must be taken to be so used by most of our legal authorities—we have, as to *legal origin*, a triple division of things; that is to say, we may with advantage classify things, when considered as to their legal origin, under three heads—viz., ‘sovereign origin,’ ‘individual origin,’ and ‘consensual origin.’

Sovereign Origin.—Of things, in the strict and narrow sense of the term, one only can be said to be of sovereign origin; that one, however—ininitely the most important of all—is the *territory*, or shortly *land*, for it is to the sovereignty that the subjection of the territory of the nation is due. When or how the sovereignty subjected it, is matter of history, not of law. That it has subjected it, and reduced it into *dominium*, is the fact with which we have to deal, for it is to that fact that all its sovereign powers are referable. It is in the exercise of these sovereign powers that it creates all *estates* or *interests* in land.

Again, using the word ‘things’ in the extended sense—viz., in that in which it embraces *rights*, *duties*, and *obligations*—we trace the sovereign origin of things, that results from the mere fact of the subjugation of the land, and the creation of estates in it. For those estates must be conferred upon subjects, and must be held by those upon whom they are conferred upon some *conditions* or *terms*. Those *conditions* or *terms*, be they what they may, establish, or rather are, the rights and duties, not merely of the holders of those estates, but of all others in reference to them. Those rights and duties, therefore, that spring from the fact of the existence of territory, constitute the second class of things of sovereign origin.

The third and remaining class of things of sovereign origin embraces all those rights¹ and duties, enjoyed by and incumbent upon persons, that are not incidental to the possession of land—which, in order to distinguish them from the former, may be styled *personal*, as they relate to the person and the whole of one's property, land excepted.²

Individual Origin.—But, though all rights and duties originate with and in the law, the *subject* of some of those rights may have an origin which can neither be ascribed to nature—that is, in the sense in which we have spoken of natural origin—nor to the law. They originate with private individuals; they are the births or fruits of the brain or the hand, and are called discoveries, inventions, or manufactures. The last of these, however, *i.e.* manufactures, is clearly distinguishable from the others, and may, for most purposes, be regarded as mere conversions of pre-existencies. Concerning each, however, this much is indisputable, that no rights or duties can possibly exist respecting them, prior to their origin, save the right *to originate*. The moment, however, that they are respectively brought into existence, rights and duties peculiar to each immediately attach to them.

Consensual Origin.—Again, using the term *things* in the same extended sense, we come to the third and last class of things of legal origin—a class which is derived from the sovereignty, but is essentially different from *sovereign origin*. The first class of things of legal origin, we have said, embraces all rights directly or immediately created by the sovereignty. Though not specified

¹ See 'Derivative Rights—Contracts,' p. 7.

² See Index, 'Chattels real.'

when referring to that class, one of such rights is the right *to contract*; or, in other words, to lay oneself under legal obligations to another, and, by so doing, to give to that other rights which he could not derive directly from the sovereignty, which he could not originate by himself, and which must be created by the coincidence of two wills. Such things are, consequently, said to be *consensual*, and are styled *contracts*. This third class of things, then, as it embraces the entire body of contracts, constitutes one of the most important branches of Private Law.

Having thus glanced at the nature and origin of things, we propose, in an equally cursory manner, to review their incidents; after which our further investigation will be pursued with the detail consistent with our limits that is demanded by the relative importance of each subject.

Incidents.—Incidental to every existence are certain properties and attributes, some of which are *natural*, others *purely legal*. Some, indeed most, of such properties might be styled *mixed*; for the law, whether as to persons or as to things, not merely necessarily, but professedly, looks to their nature. Change, for example, is the characteristic of all things mundane; birth, growth, and decay are not confined to man, the beast, and the plant, for the field of one age may become the forest of another, the coal-mine of a third. The relative *rapidity* of the change, and not the *fact* of the change, is that which constitutes one of the peculiarities of the particular object. We do not talk of the birth, decay, or extinction of land, because, relatively to persons and other things, those changes, in the case of land, are too gradual, and the stages too

remote, to constitute an element in our calculation or speculation respecting it; but we take note of its accretions, because these are of moment to the individual occupant of a particular parcel to whom the consequences of a stream bursting its ancient bounds may be of the utmost importance, by adding to or taking from his available land. Still more important are the *fruits* of things, whether those things are lands, or cattle, or goods, or money, for in many instances the value of the thing to us consists in the harvest of its fruits. Land unproductive of vegetable or mineral wealth is a desert, profitless to man. The value of beasts fit neither for draught nor burden, consists, while alive, in the fruits they yield; for example, their milk, or their wool, and their young, the source of future crops. The fruits we derive from our goods and chattels may be the comfort and pleasure they afford us, or the money they produce by being lent on hire. The fruit of money is its interest. The man who has to sell his field, to kill his sheep, or to spend his sovereign, in order to live, does not subsist upon the fruits of his field, his sheep, or his sovereign, but upon it, or upon that which he has obtained in exchange for it.

CHAPTER II.

DOMINIUM.

Dominium.—Dominium may be defined to be ‘the control of or over a given thing.’ In this, the widest sense of the term, it is evident that *dominium* does not necessarily import *ownership*; for a person may have the dominium or control of or over a thing of which he is not the owner; for example, if we take A. to represent a person, and B. to represent any given thing whatsoever, it is clear that A. is either the owner of B. or he is not. That if he is the owner, he is either *in possession* of it or he is not. That if he is not the owner, he may either be in possession or not be in possession; that if he is not the owner but is in possession, he must be in possession as *not of right*, that is, in wrongful possession (trespasser); or he must be in possession *as of right*; and if he is in possession as of right, though not the owner, he must be in, by virtue either of a contract, or a license, or as a fiduciary.¹ When A. is the sole owner, and is in possession, he is said to have the *absolute dominium*—to have the *jus utendi, fruendi, et abutendi quatenus juris ratio patitur*; that is, the right of using, enjoying the fruits of, and of alienating the particular subject of property to the fullest extent permitted by the law.² If he is the owner, but

¹ See *ante*, ‘Intervention,’ p. 55.

² See Inst. P. L. p. 80.

not in possession—or, if he is not the owner, but is in possession—he is said to have a *qualified dominium*, his rights and duties being regulated by the nature of his title. The ownership of property may be said to be *qualified*—(1) when the ownership is shared with another or others; (2) when the time of enjoyment is limited or deferred; (3) when the use is restricted, otherwise than as a mere natural incident.

Whatever may be the nature of the thing that is the subject of property—*i.e.*, whether it comes under the category of *real*, *personal*, or *mixed property*,¹ *e.g.*, whether it is land,² a horse, or a deed chest,—if it belongs to A. solely, it is said to be his *absolute property*;³ whereas, if A. gives, sells, hires, or entrusts it either to B. and C. jointly, or transfers it to either B. or C. for a specific time or purpose, it becomes not merely the qualified property of B. and C., or of B. or C., as the case may be; but, except in the case of gift, sale, or barter—in either of which cases A., by this perfect alienation, transfers his dominium—A. converts his

¹ See *post*, 'The Legal Distribution of Things.'

² In the eye of the law, every man's land is inclosed by an ideal if not an actual fence. His land is therefore called his *close*. Every unauthorized entry upon or direct interference with it is called a trespass; and, being a trespass to his close, as distinguished from his person, is styled a *trespass quare clausum fregit*, or a trespass whereby his close was broken. The mere trespass is the tort; hence it is not necessary to show any actual damage in order to support the action of *trespass quare clausum fregit*. As the law regards every man's land as his close, so it esteems his house his *castle*, and as such his safe retreat. *Domus sua cuique est tutissimum refugium*. His house is, in fact, but a portion of his land. *Cujus est solum ejus est usque ad cælum*. So, if another builds a house or plants trees upon it, they immediately become the property of the owner of the land; for whatever is planted on the land, and by whomsoever planted, it becomes part of the land—*Quicquid plantatur solo, solo cedit*. Indeed, subject to sovereign necessities, the owner's rights, he having what is called the absolute dominium or ownership, are limited only by the duty so to use his own as not to occasion injury to another—*Sic utere tuo ut alienum non lædas*.

³ But see *post*, cap. 6, 'Estates in Realty,' 'Quantity of Interest'; and cap. 12, 'Sovereign Interest in Personality.'

absolute into a qualified dominium. In other words, whenever a thing, at one and the same time, is the subject of the proprietary rights of more than one person, though the rights of one or more of such persons may be in abeyance, the dominium, ownership, or property of each is *qualified*.

If we accept it as a fact that dominium or ownership does not necessarily import possession, we naturally divide owners or proprietors into two classes—viz., owners *in possession* and owners *not in possession*, or *reversioners*; and, as to dominium, have but one other class of persons to consider—viz., persons in possession who are not owners, but who, from the fact of their being in possession, necessarily have *dominium*, in the sense of *control*, over the thing in question.

Persons in possession, but who are not owners, may be divided into two classes—viz., *trespassers*,¹ and *termors*; the latter being divisible into three classes, viz., *contractors*, *fiduciaries*, and *licensees*.² I use the word '*trespasser*' to express a person in possession without legal title to possession. Such person

¹ 'If,' says Maule, J. (*Jones v. Chapman*, 2 Exch. 821) 'there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession? I answer, the person who has the title is in actual possession, and the other person is a *trespasser*; they differ in no other respect.' The right to expel the wrongful possessor, termed *ejectment*, belongs to him who has the right to possession; hence the fundamental rule in actions of ejectment is, that '*the plaintiff must recover by the strength of his own title, and not by the weakness of his antagonist's*;' for, if neither the plaintiff nor the defendant has the right to possession, there is no reason why the Court should disturb the person in possession till he who is actually entitled appears. Though ownership without possession is insufficient to sustain trespass, yet, as trespass is purely a *possessory action*, founded solely on the fact of possession, the fact of ownership is not a necessary ingredient in an action of trespass against a wrong-doer. (See *Lambert v. Gutter, Willes*, 221; *Asher v. Whitlock*, L. R. 1 Q. B. i.) See *ante*, 11, n. 2.

See 'Intervention,' *ante*, p. 55, and *post*, 'Alienation in Trust.'

has no legal rights to or in the thing possessed, except those derived from the bare fact of possession; such right, however, is a legal right as against all but the owner entitled to possession.

I use the word '*termor*'¹ to express one in possession as of right—not necessarily by contract—but for a prescribed period.² I use the word '*contractor*' to express one in possession as of right by contract, and for his own benefit. I use the word '*fiduciary*' to express one in possession as of right, not for his own, but for the benefit of another or others; and the word '*licensee*' to express one in possession for his

¹ The expression *termor* is, in technical language, almost exclusively confined to realty. It is, however, none the less applicable to personality. It is here used to express an interest in property, whether real or personal, which is limited as to the time of duration.

² As the particular estate or interest created by the *grantor* determines the relation that shall subsist between him and the *grantee*, so the fact of his having created an interest in the land, and vested it in the grantee, necessarily alters the relation that existed prior to the grant—(1) between himself and the grantee; (2) between himself and strangers; and (3) between those strangers and his grantee. The land remains the same; the act that was, is still a trespass. But the question arises, Who has suffered the injury contemplated by the law? Was it sustained by the grantor, now styled the reversioner; or by the grantee, styled the tenant; or by both reversioner and tenant? That it was sustained by the tenant is clear, for trespass to land is always trespass to the right of the tenant; and as to the tenant, as we have already seen, the fact of actual damage is immaterial, except in determining the measure. Whether it was an injury or not to the reversioner, depends entirely upon the nature and extent of the damage. If the damage is of such a nature as to survive the term of the tenant, it is an injury to the reversioner; if it is not of such a nature, it is not an injury to him. Every trespass to land is, therefore, an injury to the tenant, and may be an injury also to the reversioner, when of such a nature as to endure till the reversioner becomes himself again the tenant. But it cannot be a trespass as to the reversioner, for trespass can only be committed against the person in possession. The right of action, however, in either case, it being one and the same wrongful act, dates from the act, and may be exercised by either the tenant or the reversioner, each for his particular injury. But as the interests of the reversioner and tenant are distinct and different, a joint action against the wrong-doer cannot be maintained by the reversioner and tenant. The tenant must sue, if at all, in *trespass*; the reversioner, in *case*.

own benefit, with the sanction of the owner, but not by virtue of *contract* or *trust*.

Possession (or occupancy) hostile to the rights of the owner; possession granted by the owner for the sole benefit of the grantee; possession granted by the owner for the mutual advantage of owner and grantee; and possession given by the owner for the sole benefit of the owner or his nominee, appear to embrace every kind of possession. Nor can it be doubted that each of these four classes must have existed in every state, and in every condition of that state, and in relation to every species of property; and that, having existed, each class of possession must have drawn to it, or given rise to, legal doctrines adapted to its distinctive character.¹

¹ We are, however, not unfrequently told that the doctrine of *Trusts*, as a branch of English Law, is of comparatively modern origin. Our text-writers, almost with one consent, point to the reign of Henry VIII. as the date of its institution. They admit, indeed, that the doctrine of *Trusts* had its origin in the prior doctrine of *Uses*, and intimate that the doctrine of *Uses* was invented by the ecclesiastics of the thirteenth and fourteenth centuries, the necessary inference from their language being that, prior to that period, our ancestors were ignorant of the doctrine of *Trusts*. (See Appendix A.) Obedient to such teaching, modern writers on 'bailments'—admittedly a branch of the Common Law, and, as such, not denied an existence coeval with the foundation of that branch of our law—appear to have felt themselves not a little perplexed with the classification of the various kinds of bailments. For example, Lord Holt, in 1703, in the celebrated case of *Coggs v. Barnard* (See *Smith's L. C.* i. 171), commences with 'depositum,' defined by him to be 'a naked bailment of goods to be kept for the use of the bailor gratis'; proceeds with 'commodatum,' 'locatio rei,' 'vadium,' 'locatio operis faciendi,' all bailments with consideration; and concludes with 'mandatum,' which he defines to be a delivery of goods to somebody who is to carry them or do something about them gratis. Upon what principle he so arranges the different kinds of bailment, it is difficult to say, unless, indeed, he had some notion of drawing the circle, and showing that, between the bare deposit and bailment for one fiduciary purpose, and that for another, deposit and bailment must be for the mutual benefit of depositor and deposites, and the result of *contract* as distinguished from *trust*. (See these several points, *post.*) The object of directing the reader's attention in this subject is to establish what appears to the writer to be

Acquisition.—The acquisition of property may be said to be either *original* or *derivative*. That is, in the case of *original* acquisition, the title to the property is not derived from any other person, whereas, in the case of *derivative* acquisition, it is. The subjects, therefore, of *original* acquisition are said to be *extra dominium*, the subjects of *derivative* acquisition are said to be *in dominium*. If we may be permitted to call that which is not in existence at the moment, but which will, or may, come into existence at a future time, a *thing*, we may say that every thing is in one of three positions; viz.—(1) *in esse, i. e.*, in being, but *not in dominium*; (2) *in esse*, and *in dominium*; or (3) *not in esse*, and necessarily *not in dominium*.

Original Acquisition.—Original acquisition can be made of a thing *in esse, but extra dominium*, in one way only—viz., by *Usucapio* or *Occupancy*. It is, however, customary and convenient to treat of this mode of acquisition under three heads; *i. e.*—(1) *Occupancy*, in the case of land; (2) *Capture*, in the case of animals; and (3) *Finding*, in the case of chattels personal. Original acquisition may be made of a thing *not in esse*, by either (1) Accession or accretion, (2) Invention, or (3) Manufacture. Original acquisition cannot be made of a thing *in esse and in dominium*, but derivative acquisition may be made of it by (1) Contract—*e. g.*, gift, barter, exchange, sale, marriage, (2) Specification, (3) Commixtion, or (4)

incontrovertible; viz., that the two forms of bailment respectively designated, by reference to their purpose, 'depositum' and 'mandatum,' are pure fiduciary deposits or trusts; that the possession of the bailee, in either case, is that of a trustee; that, consequently, the doctrine of trusts is coëval with that of bailments; and, in short, that there cannot be any difference in principle, though there may be in detail, between the fiduciary of real and the fiduciary of personal property. (See *post*, 'Alienation in Trust.')

Succession. It may be stated generally, that, in the case of original acquisition, the dominium is always *absolute* when not qualified by being *joint*; whereas, in the case of derivative acquisition, the dominium may be either *absolute* or *qualified*—*e. g.*, in the case of gift, sale, barter, or exchange, it is *absolute* when not *joint*. In all other instances, it is *qualified*. We will discuss these various modes of acquisition in the order indicated.

Occupancy, Limitation, Prescription.—Of the three terms '*occupancy*,' '*limitation*,' and '*prescription*,' the term *occupancy* is the widest; it may be considered as the generic term, the other two designating species of that genus. The legal doctrine of *occupancy* is, in fact, a recognition of the natural mode of acquiring property, viz., by taking possession of the unoccupied; coupled with a declaration that the necessity of certainty as to ownership, renders it expedient to hold that such possession during a given period shall be held to give an indefeasible title to the occupant.

Occupancy.—The term '*occupancy*'¹ is usually and

¹ Blackstone mentions occupancy as a mode of acquiring property. He says, 'There are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an *usufructuary* property is capable of being had; and therefore, they still belong to the first occupant during the time he holds possession of them, and no longer. Such, among others, are the elements of *light*, *air*, and *water*, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; and such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which any man may seize upon, and keep for his own use and pleasure.' (1 *Steph. Com.* i. 159.) Sovereign title by *occupancy* is intelligible in the case of newly-discovered countries. Private title to realty by *limitation*, or *prescription*, or to personalty by *capture*, &c., and the English doctrines of *easements* and *usufructuary rights*, are no less so; but unless we are justified in saying that a man acquires rights of property in the fire with which he burns

conveniently confined to the case of the original acquisition of territory by a sovereign power.¹

Limitation.—The term limitation, when applied to dominium,² is confined to the acquisition of *land or goods and chattels*, by virtue of *statute*—which, by barring the rights of the prior owner, converts a defeasible title of the actual occupant into an indefeasible title.³

*Prescription.*⁴—The term prescription is, in our legal system, confined to the like mode of acquiring what are styled *incorporeal* interests in land.⁵

Continuous Possession, the effect of.—It sometimes happens that the owner of property, whether real or personal, either through ignorance of his rights, or negligence in protecting them, allows another, either by himself, or by himself and representatives, to occupy, enjoy, and deal with such property, as if it were his own. In such cases, the law has fixed given limits, regulated by the nature of the property, within which the owner must assert his rights, or for ever lose them. The practical result of which is, that the undisturbed possession for the time specified, transfers the property from the original owner to the person in possession. Undisturbed possession, therefore, for a given period, determined by the nature of the subject of possession,

his finger, it is not easy to conceive what is to be understood by this passage as a legal proposition.

¹ See Inst. P. L. p. 257—262.

² It is also applied to the limitation of the right of action, in cases not involving the settlement of property rights.

³ In the case either of 'Limitation' or 'Prescription' the title is essentially *original*, the statutory right being obviously based upon an *abandonment* by the prior owner, which after a given time he is precluded from denying. See '*Continuous possession*.'

⁴ '*Prescriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis.*' (Co. Litt. 113 b.)

⁵ See *post*, cap. xi.

gives a legal title to it, or, in other words, is one mode of acquiring property—*i. e.*, provided always that there is no fraud.

In the case of Realty.—When the *adverse user* extends to entire occupation, the right of the original owner is barred—*i. e.*, is put an end to—in the case of land itself, as to private individuals, by 3 & 4 Will. IV. c. 27, s. 2, after twenty years.¹

Without attempting to give the history of the law of *prescription*, we may remark that, prior to the 3 & 4 Will. IV. c. 71, intituled ‘An Act for shortening the time of Prescription in certain cases,’² the existence of

¹ 3 & 4 Will. IV. c. 27, s. 2, ‘After the 31st day of December, 1833 no person shall make any entry or distress, or bring an action to recover any land or rent, but within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person, through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.’ See 37 & 38 Vic. c. 57, *post*, Appendix C.

² The following abstract of its provisions is taken from Burton’s Compendium of Real Property, p. 326, n. (a) :—‘No claim by custom, prescription, or grant to any right of common, or other profit or benefit to be taken and enjoyed from or upon land, except such matters as by the Act are specially provided for, and except tithes, rent, and services, shall, where it has been enjoyed by any persons claiming right thereto without interruption for 30 years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of 30 years; and, where taken and enjoyed, as aforesaid, for 60 years, the right shall be deemed absolute and indefeasible, unless it appears that the same was taken and enjoyed under some deed or writing (s. 1).

No claim by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, when the same shall have been enjoyed by any person claiming right thereto without interruption for 20 years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to that period; and, after the like enjoyment for 40 years, the right shall be deemed absolute and indefeasible, unless enjoyed under some deed or writing (s. 2).

Where the use of *light* for any dwelling-house or other building has been enjoyed for 20 years without interruption, the right shall be

the right of the actual possessor of an incorporeal hereditament rested upon the *presumption* of a *lost grant* made to his ancestor or predecessor at '*time immemorial*,'—i. e., before A.D. 1189—which presumption might be rebutted by showing the commencement of such enjoyment at a later though remote date, which, as the Act says, was 'in many cases productive of inconvenience and injustice.'

In the case of Personality.—From the nature of the subject of the right of property, the user that will destroy the right of the original owner must extend to the entire occupation, which, by the 21 Jac. I. c. 16, s. 3,² after the period of six years, deprives the original

deemed absolute and indefeasible (any local custom notwithstanding) unless enjoyed under some deed or writing. (s. 3.)

Each of the aforesaid periods shall be the period next before some suit or action, wherein the claim or matter to which such period may relate shall be brought into question; and no act shall be deemed an interruption, unless submitted to, or acquiesced in, for a year after the party interrupted had notice thereof, and of the person making, or authorizing the same to be made (s. 4); sec. 5 provides as to form of proceeding; sec. 6 disallows presumption in the case of periods shorter than those named; sec. 7 provides as to disability, *e. g.*, from *infancy*, *non compos mentis*, &c.; sec. 8 fixes the period in the case of *water* at 40 years, which see.

¹ See Inst. P. L. p. 348.

² 21 Jac. I. c. 16, s. 3. 'All actions of *trespass quare clausum fregit*; all actions of *trespass*, *detinue*, action *sur trover*, and *replevin* for taking away of goods and cattle; all actions of account, and upon the case [other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, repealed by 19 & 20 Vic. c. 97, s. 9]; all actions of debt grounded upon any lending or contract without speciality; all actions of debt, of arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued, or brought at any time after the end of this present Session of Parliament—shall be commenced and sued within the time and limitation hereinafter expressed, and not after: that is to say, the said actions *upon the case* (other than for *slander*), and the said actions for *account*, and the said actions for *trespass*, *debt*, *detinue*, and *replevin* for goods and cattle, and the said action of *trespass quare clausum fregit*, within three years next after the end of this present Session of Parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of

owner of his right, and establishes that of the new, by debarring the original owner of all legal means of recovering possession.

Capture.¹—The term acquisition by capture, as used in connection with private law, may be said to be confined to animals *feræ naturæ*. Animals *feræ naturæ* appear by our law to be divided into three classes; viz.—(1) game²; (2) royal beast, fish, and fowl;³ and (3) all other animals that are not *domitæ naturæ*.⁴ The right to kill game upon any land belongs to the owner of that land *pro tempore* (mere occupiers for short terms excepted), and may be conferred by him upon whomsoever he may think fit. The absolute property in game vests in him upon capture, whether by him or by another for him, or in the person to whom he grants the right to capture and appropriate.⁵ All persons

trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present Session of Parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present Session of Parliament, or within two years next after the words spoken, and not after. But, by s. 7, 'if any person or persons that is or shall be entitled to any such actions of trespass, &c. &c. . . . be, or shall be at the time of any such cause of action given or accrued, fallen, or come within the age of 21 years, *feme covert, non compos mentis* [imprisoned, or beyond the seas—no longer disabilities, by virtue of 19 & 20 Vic. c. 97, s. 10]; then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before-mentioned after their coming to or being of full age, discover, of sane memory [or returned from beyond the seas], as other persons having no such impediment should have done.'

¹ For 'International rights as to,' see Inst. P. L., p. 316 *et seq.*

² Game includes hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (1 & 2 Will. IV. c. 32, s. 2). The 25 & 26 Vic. c. 114, for the purposes of that Act, extends the list to woodcocks, snipes, rabbits, and the eggs of pheasants, partridges, grouse, black game, and moor game.

³ *E.g.*, deer, bears, whales, sturgeon, and swans.

⁴ Under the title *domitæ naturæ* may be ranged all those commonly styled domestic animals. (*Steph. Com.* ii. 5.)

⁵ See 1 & 2 Will. IV. c. 32, and *Steph. Com.* ii. 20.

killing, taking, or pursuing game (hares excluded), must, however, take out a yearly excise license for that purpose.¹ If a man starts any animal *feræ naturæ* on his own ground, and follows it on to the ground of another, where he captures it, the property vests in him. If he starts it on another's ground, and there kills it, the property vests in the owner of that ground. If he starts it on the ground (not warren) of one and kills it on the ground of another, the property vests in himself,² notwithstanding the fact of his being a trespasser.³

Accession.—When anything, the property of A., receives either by natural or artificial means an accession—*e. g.*, vegetation to his land, young to his cattle—the thing acceded is his as an incident of his property in the thing to which the accession has taken place. When then his mare has a foal by another man's stallion, the foal is his;⁴ for, in the case of animals, *partus sequitur ventrem*.⁵

Invention.—The word 'invention,' when used to indicate the legal rights and duties incidental to the products of the brain, may be regarded as a generic term, the two species being *copy-right* and *patent-right*. Concerning copy-right, I do not propose to add to the few words that are to be found upon that subject in the 'Institutes of English Public Law,' p. 399. As to *patent-right*, Lord Cairns, in introducing his Bill respecting it, is reported to have said that the

¹ See 11 & 12 Vic. c. 29; 23 & 24 Vic. c. 90.

² See *Sutton v. Moody*, 11 Mod. 75; 1 Id. Raym. 250.

³ See, as to Chase or warren, Steph. Com. ii. 22.

⁴ Si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.

⁵ Cygnets, the young of swan, are an exception to this rule, they being the joint property of the owners of the male and female birds, between whom they are divided. (7 *Coke's Rep.* p. 82.)

entire statutory law concerning patent-right will be contained within the four corners of the new Act. Such being the case, nothing is here added to what has been said in the 'Institutes of English Public Law,' respecting *monopolies* and *patent-right*. Should the Bill in question be law before this work is published, the Act will be found in the Appendix.

Derivative Acquisition.—Derivate acquisition, as already stated, and as the term indicates, exists by virtue of transfer from a former to the present possessor. We have observed that, whereas in the case of original acquisition the dominium is always *absolute* when not *joint*, in the case of derivative acquisition it may be either *absolute* or *qualified*. We may now add this further remark, that, as a matter of reason, and as a general principle of law, a man cannot transfer to another what he himself does not possess. Whenever, therefore, dominium is acquired derivatively, the first fact to be ascertained is the exact interest of the transferor. So logical and reasonable is this principle, that its statement is sufficient to secure its acceptance as a naked proposition. But the moment we attempt to apply it to the every-day affairs of life, we see that it involves a practical impossibility—viz., the investigation of every man's title to the article he wishes to sell, *i. e.*, assuming that the purchaser will not part with his money till satisfied as to the vendor's title. To meet this difficulty, the law excepts from the general principle of the rule—(1) The transfer of corporeal chattels by sale in *market overt*; and (2) By the Statutes of Limitation and Prescription, as already explained, makes the possessor secure by effluxion of time. Dominium, or ownership, may be acquired derivatively either during

the life, or after the death, of the person from whom it is derived. It may be transferred either voluntarily or involuntarily; that is, either by his act, the object of which is to effect the transfer, or by some act or omission of his, the legal consequence of which is a transfer.

Voluntary¹ Alienation.—Inter vivos.—The acquisition of dominium, resulting from voluntary alienation, may be divided, according to the object or intention of the alienation, into three classes,—viz. (1) Where the object is to vest the ownership in some specific person or persons; (2) Where the primary, if not the sole object is to divest the dominus; and (3) Where the object is to create a mere qualified interest. Under the first head, we have the contracts of *gift*, *sale*, and *barter*, to the specific consideration of each of which, as to that of those falling under the third head, our attention will hereafter be directed in detail. Under the second head we have *abandonment*. Under the third the contracts of *pledge*, *loan* and *hire*, and *alienation in trust*.

*Abandonment.*²—Concerning abandonment, two observations only need be made,—viz., (1) The term ‘property’ does not necessarily import a thing of value or benefit. A man’s shares in a company are property. They may, however, be worse than valueless. They may have liabilities attaching to them. The

¹ In conveyancing, the term ‘*Voluntary conveyance*’ signifies a conveyance without *valuable* consideration.

² I have ranged, under the heading ‘*Original acquisition*,’ title secured by the Statutes of Limitation and Prescription, regarding them as species of the genus *occupancy*, which is, undoubtedly, when understood in its widest sense, not merely one, but the most important of all the means of original acquisition. I have, however, in Table IV., repeated their mention, and in the second instance placed them under the subdivision of derivative acquisition, ‘*Abandonment*.’ To some, that may appear the better place.

owner of such property cannot throw off his liability by abandoning. He cannot, in fact, abandon. (2) Speaking generally, the right to abandon attaches to such property only as can be abandoned without violation of duty or breach of obligation.

Involuntary Alienation.—*Losing and Finding.*—The general rule of law as to things lost or abandoned called *bona vacantia*, is that they become the property of the first occupier or finder, provided he takes reasonable and unavailing pains to discover the last owner.¹ In the case of property designedly abandoned, the finder's property is *absolute*. In the case of property lost, the finder does not acquire an absolute, but a *qualified* property, which is, however, sufficient to enable him to keep the thing found against all but the rightful owner.² To these general principles, however, there is this exception, that things falling under the designation of *treasure-trove*, *waifs*, *estrays*, and *wrecks*, do not vest in the finder, but belong to the crown.³

Commixtion (Confusion).—If the owner of property so mixes his property with that of another, and without his consent, that it is impossible after such mixture to distinguish or apportion the original property of each; as, for example, if A. pours wine into B.'s wine, or mixes flour with his flour. Whatever may have been the intention of A., the property in the entire bulk vests in B.⁴

Forfeiture.—By 33 & 34 Vic. c. 23, s. 1, it is en-

¹ See Steph. Com. ii. 539.

² See *Armory v. Delamirie*, Smith's L. C. i. 301.

³ See Steph. Com. ii. 539. As to the disposal of things left accidentally in public conveyances—cabs and omnibuses—see the Hackney Carriage Acts, 1 & 2 Will. IV. c. 22, s. 49; 16 & 17 Vic. c. 33, s. 11. See *post*, 'Common Carriers.'

⁴ *Ward v. Ayre*, Cro. Jac. 366.

acted, that 'No confession, verdict, inquest, conviction, or judgment of or for *treason*, or *felony*, or *felo de se*, shall cause any attainder, or corruption of blood, or any forfeiture or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon *outlawry*.' The effect of this enactment is to leave forfeiture in the case of outlawry as the only instance of forfeiture, the dominium being absolute. Where, however, the dominium is qualified or special, forfeiture for breach of covenant is of frequent occurrence—*e.g.*, in the relation between landlord and tenant.¹

Bankruptcy.²—Bankruptcy is, unhappily, a somewhat fruitful source of transfer of dominium, and that not merely of the property of the bankrupt himself, but, as we have seen, of that of others, which happens to fall under the designation of '*property in the apparent ownership and disposition of the bankrupt*,' at the time of his adjudication.

Alienation post Mortem.—At death, the property of every man necessarily passes into other hands, unless indeed it is so concealed as not to be found. His property, that excepted which dies with him—mere life interests,—is vested in another or others, either by himself or by act of law. It being his, he has the right to leave it to whomsoever he may think fit; nor will the law question his disposition, whatever it may be, if (1) at the time of the disposition he had mental capacity; (2) if the disposition was not induced by any fraud or undue influence; and (3) the disposition is not in violation of the law.³ Should he abstain

¹ See *post*, 'Landlord and Tenant.'

² See *ante*, p. 256 *et seq.*; and Inst. P. L. pp. 401—406.

³ See, as to gifts for superstitious or charitable uses, 'Jarman on

from disposing of his property, either by *devise*, *bequest*, or *donatio mortis causæ*, the law determines the successors to his real estate, by the Canons of Inheritance—enacted by the 3 & 4 Will. IV. c. 106, as amended by 22 & 23 Vic. c. 35, ss. 19 & 20—and the doctrine of Escheat. It determines the successor or successors to his personalty by the Statute of Distribution—the 22 & 23 Car. II. c. 10; 29 Car. II. c. 3, s. 25; 1 Jac. II. c. 17.¹

Extinction.—Under the title ‘extinction’ I have, in Table VII., ranged ‘destruction,’ ‘merger,’ ‘abandonment,’ ‘loss,’ ‘commixtion,’ ‘forfeiture,’ and ‘bankruptcy.’ Upon referring to the several heads in the same Table which necessarily fall under the title ‘acquisition,’ the reader will at once see that, as the acquisition of proprietary rights by one, involves in many cases the loss or extinction of those rights in another, it is necessary, when tabulating, to range things under different titles. It is, however, unnecessary to repeat, under the second title, what has been said concerning those heads that have fallen under the title first considered. Our attention is therefore here confined to ‘destruction’ and ‘merger.’

Destruction.—The term ‘destruction’ necessarily involves the fact of the possibility of destruction. Speaking as scientific chemists, we should at once admit that nothing is capable of destruction, and that that which is commonly termed destruction is, in fact, nothing but change of form, or combination of elements. Speaking as lawyers, we say that any change

Wills,’ chap. 9; and, as to the rule against perpetuities, *Thelluson’s Case*, *post*.

¹ See *post*, ‘Succession.’

of form which destroys the identity, is, as a general proposition, the destruction of the original subject of property. The term 'destruction,' then, when applied to property-rights, is referable first to the subject of property itself, and secondly to the property-rights in the subject, be they what they may. As to the subject itself, it may be either capable or incapable of destruction—*e.g.*, a horse, a book, a table; indeed, speaking generally, all things that are designated 'goods' and 'chattels personal' may, in the legal sense of the term, be destroyed, whereas *land* cannot. By the destruction of a thing, all property-rights in it are necessarily destroyed or extinguished. Such property-rights may, however, be destroyed or extinguished in these same things without the destruction of the things themselves. So, in the case of things that cannot themselves be destroyed, the property-rights in them may be—*e.g.*, by *forfeiture*, *prescription*, or *limitation*, and, in one sense, by *merger*.

Merger.—It is a general principle of law, that where a greater and a less estate or interest in one and the same thing meet in one and the same person, in one and the same right,¹ without any intermediate estate or interest, the less is immediately annihilated, or, as it is technically styled, *merged*—*i. e.*, swallowed up—in the greater; *e.g.*, a man cannot at the same time be both the owner and hirer of the same horse, unless, being the owner, he has let it to another for a term, from which other he himself hires it for a portion of that term, in

¹ The different interests must come to one and the same person in one and the same right; for, *e.g.*, if he has the fee in his own right, and the less estate *en autre droit*, there is no merger. (See *Jones v. Davies*, 5 H. & N. 766; *Bracebridge v. Cook*, Plowd. 418; see *Fearne's Cont. Rem.* § 777 *et seq.*)

which case the interest of the person to whom he has let it is an interest intermediate between his interest as owner and his interest as hirer. Had the horse been hired for, say, three years, and before the expiration of that time the hirer had purchased it, say at the end of one year, inasmuch as the interest in the beast of the original owner ceased by the sale, the hirer, by becoming the owner, ceases to be the hirer; his less interest—his bailment—has merged in his greater, his proprietorship. Again, if a tenant for years¹ or for life acquires, either by descent or purchase, the fee simple in the same lands, his original interest for years or for life is immediately merged in his fee.

To this general principle there is, however, an exception in the case of estates tail.²

Merger is not confined to cases where one of the coinciding estates is greater than the other in point of *quantity* of interest; for a term of years will merge in the immediate reversion, though that be a chattel interest also, and even where the term of years in reversion is of shorter duration than the term on which it is expectant. So a fee simple conditional will merge in the possibility of reverter.³

¹ See 8 & 9 Vic. c. 106, s. 9.

² See 'Estates Tail,' *post*.

³ Step. Com. i. 319. See Index, 'Merger.'

CHAPTER III.

THE LEGAL DISTRIBUTION OF THINGS.

ALL things are, by our law, divided into three classes ; viz., things *real*, things *personal*, and things *mixed*.

Things Real.—Things real are subdivided into two classes, viz., things *corporeal* and things *incorporeal*. The subject of things real, whether corporeal or incorporeal,¹ is *land*.

*Land.*²—The term ‘land’ includes the surface and substance of the earth, and everything permanently fixed or incident to it, whether above, upon, or under it—e.g., houses, woods, waters, metals, minerals, fossils, &c.—all which pass by a grant of the land ; the maxims are, *Cujus est solum ejus est usque ad cælum*, and *Quicquid plantatur solo, solo cedit*.

Things Personal.—Things personal are of two classes, viz., *chattels real* and *chattels personal*.

*Chattels real*³ are such interests in land as are less than freehold interests.

Chattels personal.—Chattels personal are, strictly

¹ A fee simple estate in land is styled a *corporeal hereditament*. By the term *hereditament* is intended an estate that passes, if left to the disposition of the law, from the possessor to his *heir*. A right of way is styled an *incorporeal hereditament*. The one is as clearly a right, and nothing but a right, as the other ; and, being a mere right, is necessarily *incorporeal*. The reason, it is apprehended, for calling the one corporeal and the other incorporeal, is that, in the case of the former, the right, when in possession, embraces the possession and user of the land itself, whereas the latter is merely incidental to it.

² See ‘Estates in, and tenures of.’

³ See ‘Estates in Land—Chattel Interests.’

speaking, things movable which may be annexed to or attendant on the person of the owner, and carried about with him from place to place; *e.g.*, animals of various kinds, household furniture, money, jewels, corn, articles of clothing, and the like. 'All goods, as well movable as immovable, corn upon the ground, obligations, rights of action, money out of bags, and corn out of sacks, *sunt catalla*.'¹ 'Some chattels personal are without life, some living; but it is to be observed that living creatures, *feræ naturæ*, as *deer, conies, hares*, and such like, are not goods or chattels, except they are made tame. Also, charters or deeds of an estate of inheritance or freehold, although they are movable, are not chattels.'²

Things mixed.—The characteristic of things real is *immobility*, that of things personal *mobility*. We now come to the consideration of the third and last class of property, *viz.*, those things which, on account of their possessing in some degree the characteristic of each of the former, are styled *things mixed*. These are:

1. *Emblements*.—The growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator, such as *corn, hops, hemp, flax, saffron, melons, cucumbers, turnips, and carrots*—and which, as *fructus industriales*, are clearly distinguishable from *grass* and *trees*, whether fruit-trees or others—are styled *emblements*. *Emblements* are said to be *things mixed*, because, upon the death of the *terre-tenant* seized *in fee*, they devolve, by the rule of law, upon his *personal representative*, and not upon his *heir*; they form, as distinguished from the

¹ Noy's Max. 144.

² Noy's Hereditaments and Chattels, p. 60.

grass and trees, a portion of his *personal*, and not of his *real* estate.

2. *Fixtures*.—So, again, things clearly in their nature and original state personalty—such as *bricks, stones, engines, machinery, hangings, tapestry, pier-glasses, chimney-pieces, marble-slabs, wainscoating, grates, ranges, furnaces, and stoves*—may be so introduced into, and incorporated with, the realty, as, by coming within the maxim, *Quicquid plantatur solo, solo cedit*, to become a portion of the realty. When so attached as to become a portion of the realty, they are styled *fixtures*. But, depending upon the relation subsisting between the persons—*e.g.*, landlord and tenant, or heir and personal representative, or particular tenant and remainder-man or reversioner—the law as to the right of property in such articles differs considerably.¹

3. *Shares in public undertakings connected with land*.—The subject of property in public undertakings of this description, such as *mines, canals, and railroads*, to which the public are subscribers, and which is vested in them as a body corporate by charter or Act of Par-

¹ In the case of *Elwes v. Maw* (*Smith's L. C.* ii. 152), Lord Ellenborough said, 'Questions respecting the right to what are ordinarily called *fixtures* principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance—*viz.*, between his *heir* and *executor*. In this first case—*i.e.*, as between *heir* and *executor*—the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom and to consider as a personal chattel anything which has been affixed thereto. Secondly, between the *executors* of tenant for life, or in tail, and the *remainder-man* or *reversioner*; in which case, the right to *fixtures* is considered more favourably for executors than in the preceding case between heir and executor. The third case—and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance—is the case between landlord and tenant.'

By 14 & 15 Vic. c. 25, s. 3, it is enacted that, if any tenant shall, with the consent in writing of the landlord, erect any farm-building, or put

liament, is, so far as regards the *land* itself or the right of using it, *realty*; and is, for some purposes, of the same nature as regards the *fixtures* connected with the concern. But the *shares* of the individual co-operators in it—that is, the rights which each individual possesses as a partner in the surplus profit derived from the employment of the capital—are, speaking generally, in the nature of *personalty*.¹

4. *Animals fera natura*.—Animals *fera natura* are ranked as *things mixed*, because they are at one time *real*, and at another *personal*, property. When untamed they are *real*, when tamed or captured they are *personal* property.

5. *Instruments of Title*.—Instruments of title, such as *charters*, *deeds*, and *court rolls*, together with the *chests* in which they are contained, being in their nature *personal*, but in their purpose immediately connected with the *realty*, are also styled *mixed*.

6. *Monuments*.—So, *monuments*, *tombstones*, *coat-armour*, and the like, attached to the church or its land as monuments in memory of a deceased, acquire a mixed character by the mode and purpose to which they are dedicated.

7. *Heir-looms*.—So *heir-looms*—which are such *personal* chattels as, by the *special custom* of a particular place, go to the *heir* or *devisee*, along with the inheritance of the messuage or land with the occupation of which they are connected—are things *mixed*.²

up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture, they shall be the property of the tenant, and removable by him, after giving the landlord a month's notice in writing, unless the landlord elects to purchase them, in which case, the value shall be ascertained by arbitration, as prescribed by the Act.'

¹ See Steph. Com. ii. 221, and authorities there cited.

² See Steph. Com. ii. 222.

CHAPTER IV.

ESTATES AND INTERESTS IN REALTY GENERALLY.

THOUGH, strictly speaking, it cannot be said that a subject is the owner of land,¹ for the land or territory necessarily belongs to the Sovereignty; yet, in popular language, we speak of him as such. We call him the proprietor, lord of the manor, or landlord; and use these and kindred expressions to indicate his position relatively to others in respect of some particular tract or piece of land. Adopting this phraseology as indicative of one class of persons, whom we will style owners, we may designate all others as non-owners. If, then, we assume field A., and say that B. is the owner of it, and that C., though not the owner, has nevertheless certain rights in or in respect of it, which we term his interests *in alieno solo*, we may with advantage confine the term '*Estates*' to the rights of owners, the term '*Interests*' to those of non-owners.

Whether, then, the rights enjoyed by any one or more individuals in or in respect of a particular tract of land, is an *estate* or an *interest*, that estate or interest, in order to be thoroughly understood, involves consideration from various points of view. It must be one of the several *quantities* of interest known to the law.² It must be of one of the recognized *qualities*.³ It must

¹ See *post*, p. 344.

² See *post*, chap. vi.

³ See *post*, chaps. vii. and viii.

have had its origin in one of the ways known to the law. It must be held by one of the tenures recognised by the law. It must be enjoyed by one or more individuals as tenants in one of the separate or joint capacities recognised by the law. His or their interest must be either present or future, absolute or conditional, and such as is recognised by the law.¹ As it is impossible to regard either an estate or interest from these various points of view at one and the same time, so would it prove highly inconvenient to attempt the full discussion of each estate or interest separately and from each point of view. I therefore propose to consider, as closely as practicable, the question of rights in realty in the following order:—(I.) Estates, their (a) Origin, (b) Tenure, (c) Quantity, (d) Quality, (e) Tenants, (f) Vesting; and (II.) Interests, viz., Tenements and Easements *in alieno solo*. Reference to Tables VIII., IX., and X. will at once show—and that more clearly than any language that could here be used—the matter that will fall under each title.

Estates in Realty—Their Origin.—Every estate in realty is said to have had (1) a legal origin, or an origin in law; (2) an origin in equity; or (3) an origin in custom. In Appendix A., where an attempt has been made to trace the history of the assimilation of real to personal property in respect to its alienability, the origin of *equitable*, as distinguished from *legal*, estates, is noticed and commented upon; and to that the reader is here referred.

The consideration of those estates that are said to have had their origin *in custom*, and which accordingly

¹ Conditions that are repugnant to the estate created, are void; see *Bradley v. Peixoto*, Tudor's L. C. p. 858.

are commonly styled *customary estates*, will be postponed to the consideration of estates in reference to their *quantity*—for this reason, that, as in contemplation of law, customary estates are in respect of quantity but one form of the smallest estate known to the law, viz., an estate *at will*, it is necessary, to their right understanding, first to know the various quantities of interest that can be enjoyed in land.

CHAPTER V.

THE TENURE OF REALTY.

Sovereign Dominium.—We shall shortly see, when discussing the various estates in reference to the quantities of interest that can be enjoyed by a subject in any portion of the territory of England, that no subject has the *absolute dominium*, or, as it is technically termed, the *direct or allodial dominium*. That dominium is, of necessity, in the sovereignty.¹

Subject Dominium.—All estates are derived, either immediately or mediately, from the sovereignty, or, as it is usually expressed, from the Crown. Being so derived, it is a necessary consequence that they should be held upon some *condition*. This condition is termed the *Tenure*. The person whose duty it is to satisfy that condition is styled the *Tenant*. The correlative right is styled the *Seignory*; and the possessor of that right, the *Lord*. Tenures are said to be *perfect* or *imperfect*. Wherever there is a particular estate and a reversion, the former—*i.e.*, the particular estate—is held of the reversioner by an *imperfect* tenure; wherever there is no reversion, the land is held of the lord by a *perfect* tenure.² Mr. Serjeant Wright divides all the tenures known to the law of England into two classes, viz., '*knight-service tenure*' and '*socage tenure*.'

¹ See Index, 'Sovereign Dominium.'

² Burton, p. 319.

'Tenure by knight-service,' he says, 'differed by very little from *proper feuds*, for they were purely military and genuine effects of the feudal establishment in England. The services were *occasional*, though not altogether *uncertain*, as in proper feuds.¹ 'Tenures in *socage*,' he says, 'are holdings by any *certain conventional services* that are not military.' He says, 'All our English fees or holdings, whether they be frank or emphyteuticary, burgage or gavelkind—though burgage and gavelkind have many qualities different from common socage—do now fall under the notion of socage tenures, which, though they vary in point of service, succession, and the like, as improper feuds, do nevertheless retain the nature of feuds, inasmuch as they are held of some lord or superior by fealty, and usually by some other certain service or acknowledgment, and inasmuch as they yield or pay *relief*, and may *escheat*.'²

The division of tenures into *knight-service* and *socage* merely, though intelligible by reference to the way in which the word tenure is employed, is, however, essentially unsatisfactory, inasmuch as superficially it sinks the distinction between sovereign and subjects' estates in land. The division into *sovereign*, *lay*, and *spiritual title*, with the subdivision of lay tenures into *knight-service*, *socage*, and *customary* tenures, appears preferable; and is certainly more in accordance with the spirit and language of the Act abolishing *knight-service* tenure.

By the 12 Car. II. c. 24 (A.D. 1660) it is enacted, that all tenures by *knight-service*, held of the king or others, and the fruits and consequents thereof, be

¹ Tenures, p. 140; and see Appendix A. ² Tenures, p. 145.

henceforth taken away and discharged, and that all tenures of every sort be turned into *free and common socage*, save only tenures in *frankalmoign*, *copyholds*, and the *honorary services of grand serjeanty*; and that all tenures which shall be created by the king, his heirs, or successors, in future, shall be held in *free and common socage*. But it is declared that the Act shall not take away any *rent*, *heriot*, or *suit of court*, incident to any tenure altered by that Act, or other services incident or belonging to tenure in common socage, or the fealty or distrresses incident thereto. (sec. 5.)

The year 1660, and the Statute of 12 Car. II. c. 24, are therefore, as to the question of tenure, the date and enactment upon which the student of English real property law should keep his mind's eye constantly fixed. As to the tenures abolished in that year and by that Statute, that general knowledge alone is requisite which it becomes every man to possess of the history of his native country. As to those that were perpetuated, or into which the abolished tenures were converted, a more intimate acquaintance is needed. In order to keep the two distinct, and also in consideration of the limited space at our disposal for any one subject, I have, in Table IX., distinguished modern from ancient tenures. By reference to that Table, the reader will see at a glance the various tenures by which land was and is now held. For information not given here or in Appendix A., in respect of the abolished tenures, the reader is referred to 'Stephen's Commentaries.'

Lay Tenure.—Knight-service Tenure.—The whole spirit and principle of Knight-service tenure, or, as it is otherwise termed, Feudal tenure¹, may be ex-

¹ See Appendix A.

pressed in these words,—reward for personal service rendered on condition of personal service to be continued. As the tenure originated in the peculiar circumstances of the period of its birth, so, as those circumstances changed, it became oppressive; and after they had entirely ceased, it was abolished.

Grand Serjeanty.—The solitary relic of knight-service tenure at once indicates its origin, exhibits its spirit, and testifies to the vitality of the principle, when the gift and the condition coincide. For, when eminent service is rendered to the Crown or the nation by a subject, substantial recognition, so far from being marred, is enhanced by imposing an honourable, pleasurable, and at the same time essentially nominal duty upon the recipient. Such is tenure by *grand serjeanty*, which is when the Sovereign grants lands as a mark of favour, upon the condition of the grantee discharging such slight personal service as the carrying of the banner, the lance, or the sword of the sovereign, acting as his marshal, or doing the like honourable but nominal service.¹

The reader will observe that the essence of the distinction between *knight-service* and *socage service* consists in this—that, whereas in *knight-service* the render or service is *personal service*, in *socage service* the render is of a *thing* or *things specified*, or, in other words, is a mere payment.²

Socage Tenure, or Free and Common Socage.³—This

¹ Litt. s. 153.

² See 'Petit Serjeanty,' *post*, p. 340.

³ 'Tenures in *socage* are holdings by any certain conventional services that are not military, the word "socage" being, according to Mr. Somner, derived from the Saxon word "soc," which imported a *liberty, privilege, or immunity*, and "agium," which was, according to the Lord Coke, a legal termination, importing *service or duty*.' 'The privilege or immu-

tenure is of great antiquity, its origin being commonly referred to the Saxon period. Its essential privilege consists in being attended with none but *certain* and *determinate* as well as *liberal* or *reputable services*. In most instances, the service, if any besides fealty, consists of a trifling annual rent, which, when the land descends to an heir, is doubled for the first year, the lord being then entitled to the casual profit—not properly a service—called a *relief*, which is equal to one year's rent.¹

Petit Serjeanty.—The tenure by *petit serjeanty*

nity,' says Mr. Somner, 'imported by "soc," consisted in a freedom from all military and uncertain services, whereunto "agium" being added, which signified the *agenda*, the *service* or *duty* to be returned for that privilege, it comes forth "socagium" in Latin, "socage" in English; and he thinks that this term cannot, according to the opinion of our common lawyers, be derived from the word "soca," and so be understood to import "servitium socæ," that sense being, as he says, too narrow to take in all the services of the several estates that are held by socage tenure. But as Littleton obviates this objection by declaring that this tenure, which had its denomination from its most ancient and usual service, may well retain the same name, notwithstanding the service of the *plough* be now changed into many other kinds of service; I must confess that, though the conjecture of Mr. Somner be very ingenious, and though Britton's description of socage tenure seems to countenance it, yet I am inclined to prefer the general opinion of our common lawyers; (1) because our division of tenures into knight-service and socage, considering socage as a tenure *per servitium socæ*, directly answers the Norman division of tenures into *fiefs de haubert* and *fiefs de roturiere*, that is, according to Mr. Somner's own translation, the *gentleman's*, and the *husbandman's* or *ploughman's* fee; and (2) because, in this sense, the tenure in socage is like the tenure by knight-service, the other branch of tenures, simply denominated from the name or nature of the service anciently reserved upon such tenure. But, be this as it will, all our English fees or holdings, whether they be frank or emphyteuticary, burgage or gavelkind (though burgage and gavelkind have many qualities different from common socage), do now fall under the notion of socage tenures; which, though they vary in point of service, succession, and the like, as improper feuds, do nevertheless retain the nature of feuds, inasmuch as they are held by some lord or superior by fealty, and usually by some other certain service, or acknowledgment, and inasmuch as they yield or pay relief, and may escheat.' (*Wright's Tenures*, pp. 142—146.)

¹ Burton, p. 320.

exists when lands are granted by the Crown on the condition of the grantee periodically rendering some trifle to the Crown; or, as it is expressed by Littleton, where the grantee holds his land of the king, 'to yield him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war.'¹ The Dukes of Marlborough and Wellington hold lands upon this tenure, their service being to deposit annually a small flag at Windsor.

Gavelkind,—'The properties,' says Serjeant Wright, 'of gavelkind tenure are so many, and the qualities of it so different from those of any other tenure, that it seems to have been doubted whether it be a tenure of a feudal nature or not.'² It is certain that the gavelkind tenant retains strong marks of propriety, as power to alien even at the age of fifteen, freedom from forfeiture for felony,³ and many other privileges unknown to persons holding their lands by any other kind of tenure. And it is as certain that the tenure is strictly feudal, and, like the more usual tenure by knight-service and socage, denominated from the kind or nature of the prevailing service, which was, as the name imports, tributary or censual, the word "gavelkind" being, as Mr. Somner hath with great labour and learning proved, a compound of the Saxon words "gavel," variously written "gafol" or "gable," and "gecynde," the former whereof signifies

¹ Litt. p. 159.

² Authorities are not wanting in support of the proposition that, before the Conquest, all the lands in England were of gavelkind tenure, in which idea Holt, C.J., concurs in *Clements v. Scudamore* (1 P. W. 64, 2 Lord Ray. 1024).

³ See *post*, 'Forfeiture,' p. 348, n. 2.

tribute, tax, or rent, and the latter kind, sort, or quality. So that the two words put together, suggesting something of a censual nature, do, when applied to lands, directly import that such lands are censual or rented.' 'And yet we are not,' says Mr. Somner, 'to persuade ourselves that gavelkind land was censual only, or that it was not or is not in its nature liable to any other kind of service, there being many evidences still extant that sufficiently prove the contrary. . . . That it was really a tenure of a feudal nature is apparent from the obligations or services of fealty and suit of court, which were always as clearly incident to this as to any other tenure; besides, a gavelkind tenant is under much the same penalty of *cesser*, as strictly bound to perform all the services of his tenure, as any other tenant. Lands of this nature do also escheat, and return to the lord for want of heirs, though not for felony; and even in cases of felony, if the felon withdraw himself out of the country, and be afterwards outlawed, or take sanctuary and abjure the realm, the king is entitled to the year and waste of his lands and tenements, and the lord may afterwards take to them as an escheat; so that we may, without more ado, fairly conclude that this tenure is like *burgage*, a kind of *socage* tenure, and that it is as really feudal as any other species of tenure.'¹

Burgage Tenure (Borough English).—'Burgage, so called to denote the particular service or tenure of houses or tenements in ancient cities or boroughs, is most certainly a species of *socage* tenure, inasmuch as such tenements are holden either by a certain annual rent in money, or by some service relating to trade, and not by military or other service that had no such

¹ Tenures, 207—211.

relation. The qualities of this tenure vary according to the particular customs of every borough, and that without prejudice to the feudal nature of it, it being a maxim, as to improper feuds especially, that *Lex aut consuetudo loci est observanda*.¹

Customary Tenure.—Under the style ‘customary tenure’ are ranked ‘*copyholds*,’ ‘*customary freeholds*,’ and ‘*ancient demesnes*.’²

Estates that are respectively styled ‘*tenancy in dower*,’ ‘*tenancy by the curtesy*,’ ‘*freebench*,’ ‘*tenure by elegit*,’ &c., not being tenures properly so called, but mere incidents of tenures, will be noticed in what appears to be the proper place for each.³

Spiritual Tenure—*Frankalmoigne*.—The tenure of *frankalmoigne*, or *free alms*, is that by which a large part of the lands of the Established Church are held. It has no peculiar incidents, the tenants not being bound even to do fealty to the lord. The religious services of the clergy are the sole *render*. Indeed Littleton says, ‘The prayers and other divine services of the tenants are better for the lords than any doing of fealty.’⁴

¹ Wright’s Tenures, p. 205.

² See *post*, ‘Customary Estates.’

³ See each Title in the Index.

⁴ Litt. 135.

CHAPTER VI.

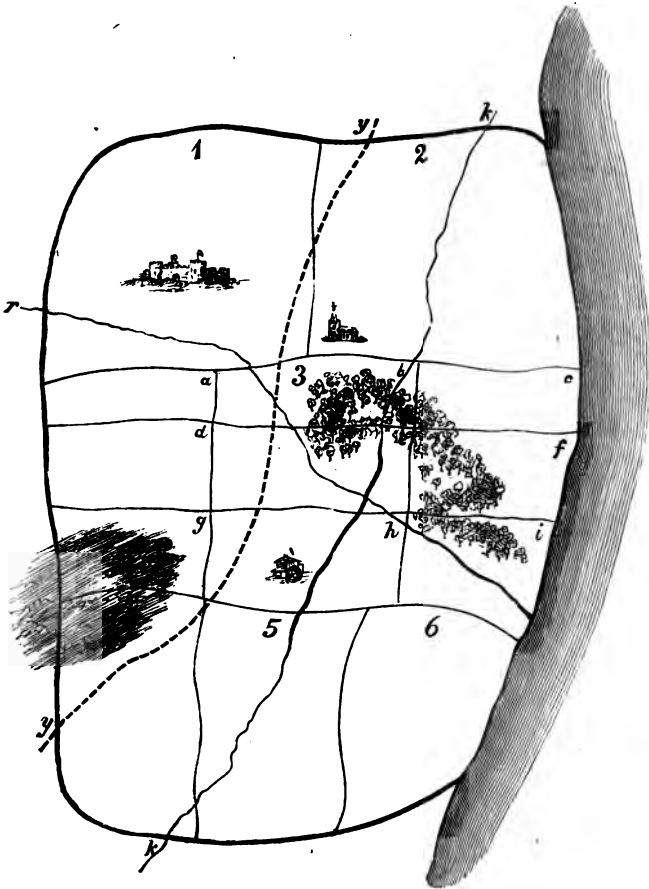
ESTATES IN REALTY—THE QUANTITY OF INTEREST.

By the term *estate*, is intended the *quantity* of interest enjoyed or possessed by an individual in the land that is the subject of the property. Quantity of *interest* must not be confounded with quantity of *land*. A man may have the largest estate known to our law in the smallest piece of land, or the smallest estate in the largest tract. For the moment we will consider *realty* as synonymous with the *land* itself. What, then, are the different estates that can be possessed by a subject in the land, or in any portion of the land of England?

The first point to observe is that, as already stated, the entire land of the kingdom does, and of necessity must, belong to the sovereignty. It is repugnant to the very notion of political union to suppose that any even the smallest particle of the territory of a nation can belong absolutely to any individual *subject*.¹ We have seen how, by the common consent of the nation,

¹ Mr. Serjeant Wright says, 'It is so absolute a maxim or principle of the law of tenures, that all the lands in England are holden either mediately or immediately of the king, that even the king himself cannot give lands in so absolute and unconditional a manner as to set them free from tenure; and therefore, if the king should grant lands without reserving any particular service or tenure, or if he should in express words declare that his patentee should have such and such lands, *absque aliquo inde reddendo*; yet the law or established policy of the kingdom would create a tenure, and his patentee should anciently before the Statute 12 Car. II. c. 24, have held of him *in capite* by knight-service If the king release the services to his

PLAN A.
THE MANOR OF DALE.



the sovereignty of this nation is lodged in the Crown, the Lords, and the Commons, assembled in Parliament. It is, therefore, in that body, and nominally in the Crown as representing that body, that the ultimate dominium of the soil does, and must, exist so long as that body remains sovereign.

Suppose, then, that sovereign body, while retaining the sovereignty, to desire to confer upon a particular individual the largest interest it is capable of bestowing in a given portion of the territory ; say, for example, in that piece of land represented by Plan A, which we will call the *Manor*¹ of *Dale*, and which we will suppose to be bounded on the North and West by lands belonging to and in the occupation of the Crown, on the South by lands belonging to private individuals, and on the East by the sea, and having the high road from *y* to *y* running through it.

It is obvious that, be it what it may, the interest granted must be something less than *absolute* or *sovereign dominium*. The first point therefore, in connection with estates in land is thus established; and is,

tenant, it will not extinguish the tenure, but the tenant shall, notwithstanding, hold by *fealty*, which is, says the Lord Coke, an incident inseparable—*i. e.*, essential to every tenure, and which cannot therefore be released. (*Wright's Tenures*, 137—139, see 12 *Car. II.* c. 24, *ante*, p. 337.)

¹ *Manor*.—There have been a variety of conjectures as to the etymology of the term *Manor*. Sir Edward Coke was of opinion that the term was derived from the French word *Memoir*, signifying to *govern* or *guide*, because the lord of the manor had the guiding and directing of all his tenants within the limits of his jurisdiction. In his *Copyholder* (§ 31), he says, 'And this I hold the most probable etymology, and most agreeing with the nature of a manor; for a manor, in these days, signifieth the jurisdiction and royalty incorporate, rather than the land or site.' But Bracton and others tell us that it is derived either from the French *manoir*, or from the Latin *manendo*, as the usual residence of the owner on his land. (*Scriven on Copyhold*, p. 1.)

that every estate enjoyed by a subject, is *derivative*—(1) as distinguished from *original*, and (2) as being carved out of a greater; and, being derivative in the second sense, it is necessarily less than *sovereign* or *absolute dominium*. The necessary consequence of its being derivative is, that the sovereignty, while granting the largest estate it is capable of granting, consistently with the notion of its existing sovereignty, yet retains to itself a certain interest in the land granted. This interest is styled the *Seignory*.¹

The largest estate—or, in other words, the greatest interest—that can be enjoyed in any portion of the British territory by a subject, is, in legal language, termed a *fee simple absolute*, or, shortly, a *fee simple*.

An estate in fee simple.—Assuming, then, the sovereignty to have granted the Manor of Dale as a *fee simple*, say to the Duke of Wellington, we enquire, his estate being something less than absolute or sovereign dominium, what it in fact is, or, in other words, what are his rights concerning land in which he has the fee simple?

They may be stated thus:—

1. **ENDURANCE.**—An estate in fee simple is an estate given to a man and his heirs. The estate, then, being given ‘*to him and his heirs*,’ he or they will retain it so long as he or any of them exists, unless he or either of them shall forfeit² or alienate³ it. If he or either of

¹ See Index, ‘Seignory’.

² Forfeiture.—By 33 & 34 Vic. c. 23, s. 1 (1870), it is enacted that ‘No confession, verdict, inquest, conviction, or judgment of or for any *treason* or *felony* or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry.’ See ‘Escheat.’

³ Alienation.—The owner of a fee simple has unlimited power of

his successors dies, not having forfeited or alienated, leaving no heir, it will, in technical language, *escheat*,¹ *i. e.*, return to the original grantor, or his representative.²

2. *USER*.—There being no forfeiture, alienation, or escheat, he and his heirs, as they come successively into possession, may use the land as they think fit. They are said to have uncontrollable power in the commission of *waste*.³

alienation by deed or will. In the case of a deed, a fee simple can only be alienated or created by the use of the word '*heirs*,' for no other word or periphrasis is permitted to supply its place, except the word '*successors*,' when the grant is to a corporation. By 1 Vic. c. 26, s. 28, it is enacted that, 'Where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.'

¹ *Escheat*.—When the tenant of an estate in fee simple dies, without having alienated his estate in his lifetime or by his will, and without leaving any heirs, either lineal or collateral, the lands in which he held his estate *escheat*—*i. e.*, return to the lord of whom he held them. Bastardy is the most usual cause of the failure of heirs: for a bastard is, in law, *nullius filius*; and, being nobody's son, he can consequently have no brother or sister, or any other heir than an heir of his body; nor can his descendants have any heirs but such as are also descended from him. If such a person, therefore, were to purchase lands—that is, to acquire an estate in *fee simple* in them—and were to die possessed of them without having made a will, and without leaving any issue, the lands would escheat to the lord of the fee, for want of heirs. (*Williams, R. P.* p. 122.) See, as to Escheat and Forfeiture, *Attorney-General v. Sir George Sands*, Tudor's L. C. 664.

² See *Seymour's Case*, Tudor's L. C. p. 616.

³ *WASTE*.—In order to understand what is meant by the expression '*waste*,' we ask the question, Of what does the estate consist? The estate consists of the land, and all upon and below it. It therefore includes all buildings, trees (timber), mines, &c. As the owner can dispose of his entire estate, either in the whole, or any part of the land; *a fortiori* can he use it, even to the depreciating of its value, by disposing of any portion of its integral parts—*e. g.*, by pulling down, or erecting buildings, felling trees, or exhausting the mines. Neither duty nor obligation requires him to study the interests of his successor. When, then, it is said that the tenant in fee simple has an uncontrollable power in the commission of waste, it is meant that he may depreciate at his pleasure the value of the inheritance. Waste is divided into two classes—*viz.*: (1) *Legal waste*, subdivided into (i.) *voluntary*

3. DOWER AND CURTESY.—The estate is liable to *Dower*¹ and *Curtesy*.²

or *commissive*, and (ii.) *permissive*; and (2) *Equitable waste*. Equitable waste comprehends such destructive or injurious acts as would not be punishable as waste at law, because consistent with the legal rights of the party committing them, but which are considered as waste, and as unjustifiable in the light of equity, as occasioning an unconscientious and irreparable injury to the interests of others, as when a 'tenant for life, without impeachment of waste,' or 'a tenant in tail after possibility of issue extinct,' or a 'tenant in fee with an executory devise over,' pulls down houses, destroys a wood, cuts down trees—even though planted by himself—planted as ornament or shelter. The offender may be made to compensate, and the threatening offender be restrained. (See *Turner v. Wright*, 1 Johns, 740; *Vane v. Lord Barnard*, 2 Vern. 738; *Garth v. Cotton*, 1 W. & T.'s L. C. 697, 705. See *The rights as to waste in the case of each estate*.)

¹ DOWER.—Dower is the right of a woman—acquired by the fact of her marriage to a man who dies legally or equitably entitled for an estate of inheritance in possession otherwise than in joint-tenancy, and which any issue which she has or might have had, might by possibility have inherited—to an estate *for her life*, to be held by her in *severalty*, commencing from the date of her husband's decease, in *one third part* of such lands and tenements in which he had such interests at the date of his death. The wife's rights in respect of Dower, as regulated by the Dower Act, 3 & 4 Will. IV. c. 105 (1834), in respect of such lands, attaches 'although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced' (sec. 3). It does not attach to any lands absolutely disposed of by her husband in his lifetime or by his will (sec. 4). Nor to any concerning which her right is *barred* by a declaration in the deed conveying the same to him, or by any deed executed by him (sec. 6), or by a declaration in his will (sec. 7). Furthermore, a devise to her by her husband of lands out of which she would otherwise have been entitled to dower, bars her right as to the remaining lands, unless a contrary intention is declared (sec. 9). In short, her right to dower is subjected to any restriction her husband may think fit to impose by will (sec. 8). And in all cases her right is postponed to all charges, debts, and incumbrances to which the land is subject or liable (sec. 5). As to the rights to Dower of women married prior to Jan. 1, 1834, see Shelford's R. P. Stats. 430.

² CURTESY.—When a man marries a woman who, either at the time of or during the marriage, is in possession of an estate of inheritance, whether legal or equitable, and survives her, she not having alienated such estate, he acquires a *life interest* in it by what is termed the *Curtesy of England*, and is styled *tenant by the curtesy*; provided she has had issue by him born alive, which issue may or might by possibility have inherited her estate as heir—*e.g.*, a son if the estate is *tail-male*, a daughter if *tail-female*; provided, further, that the estate is held by her either in *severalty* or in *common*, and lastly that the husband's rights as to his wife's property have not been deter-

4. DEBTS.—It is liable to debts by specialty and simple contract, both during the life and upon the decease of the tenant.¹

5. DESCENT.—In the event of his not having alienated his fee simple, it upon his death descends to his heirs general, according to the old or new Canons of Inheritance,² depending upon the fact of the death taking place before or after 1st January, 1834.

6. CARVING.³—Without alienating the fee simple, the owner for the time being can create every other estate of the same quality out of it; and that, either in

mined by the marriage settlement. In the case of Gavelkind, the curtesy extends only to a moiety, and ceases if the husband marries again. The birth of issue is not necessary. (*See William R. P. p. 220. See Index, Gavelkind.*)

¹ DEBTS.—The 1 & 2 Vic. c. 110, s. 11, enables the sheriff, under a writ of *elegit*, sued out by a creditor who has obtained judgment against his debtor possessed of any freehold or copyhold lands, to deliver execution of such lands (except as against a purchaser without notice of such judgment, 2 & 3 Vic. c. 11, s. 5); and even with notice of a judgment, unless a writ of execution or judgment has been issued and registered before the execution of his conveyance and the payment of his purchase-money; and even then, in order to prevail against the purchaser, the execution must have been put in force within three calendar months from the date of its registration (23 & 24 Vic. c. 38, s. 1).

By 3 & 4 Will. IV. c. 104, it is enacted that 'When any person shall die seized of or entitled to any estate or interests in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be *assets* to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty.' By 32 & 33 Vic. c. 46, s. 1, it is provided that 'All the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable; provided that this Act shall not prejudice or affect any lien, charge, or other security, which any creditor may hold or be entitled to for the payment of his debt.'

ASSETS (~~asset~~, enough).—Assets—the property of a deceased person, which is chargeable with and applicable to the payment of his debts and legacies—are divided into *real*, *per descent*, and *personal entermaines* of the executor, with a cross-division into *legal* and *equitable*.

² See *post*, 'Succession.'

³ As to alienation of realty, see *post*, 19 & 20 Vic. c. 120; 37 & 38 Vic. c. 33; and 37 & 38 Vic. c. 78.

the whole, or in any portion of the land; for example, while retaining in himself and his heirs the fee simple, he may make a grant of the whole manor, or, say, the parcel marked (1), in these terms—‘To A. and his heirs, tenants of “Dale House”’; in which case the estate of A. is styled a *qualified fee*, a *conditional fee*, or, more commonly, a *base fee*.¹ He may grant parcel (2) to B. in these words—‘To B. and the heirs of his body,’ in which case he would create an *estate-tail-general*;² or, ‘To B. and the heirs of his body to be begotten upon C.’; or, ‘To C. and the heirs of her body to be begotten by B.’; or, ‘To B. and C., and the heirs of their bodies’; in either of which cases he would create an *estate-tail-special*, inasmuch as both the original parents are specified; and in either case he might still further narrow or limit the gift by adding after the word ‘heirs’ the word ‘male’ or the word ‘female.’ By so doing he would create an *estate-tail-male* or an *estate-tail-female*.³ He may grant parcel (3) ‘To C. for life,’ in

¹ The term ‘base fee,’ as employed in the 3 & 4 Will. IV. c. 74, signifies exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of reversion or remainder are not barred. (sec. 1.) By sec. 39 of that Act, it is enacted, that ‘If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall, at the time of the passing of this Act, or at any time afterwards, be united in the same person, and, at any time after the passing of this Act, there shall be no intermediate estate between the base fee and the remainder or reversion; then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, without the consent of the protector, if any, might have created by any disposition under this Act, if such remainder or reversion had been vested in any other person.’ See *post*, p. 355, n. 2, ‘Protector of the Settlement.’

² Words that confer an *estate tail* in *real* give an absolute interest in *personal* estate. (See *Leventhorpe v. Ashbie*, *Tudor's L. C.* 763.)

³ **RULE IN WILD'S CASE.**—‘A devise to B. and his children or issues, B. having no issue at the time of the devise, gives them an estate tail; but if he has issue at the time, B. and his children take joint estates or life.’

‘Devise to A. for life, remainder to B. and the heirs of his body,

which case he would create a *life estate*, or an *estate for one's own life*; or he may grant it 'To C. during the life of K.,' in which case he would create what is termed an *estate pour autre vie*. Should he grant the estate 'To C. and the heirs of his body during the life of X.,' that estate would be styled a *quasi-entail*. He may grant parcel (4) to D. for a specified number of years, say for 10 or 999. In either case he would create what is styled a *term* or an *estate for years*. Should D., after the expiration of the term granted to him, continue to remain in possession of the land without objection on the part of the grantor, but without a fresh grant, the estate he would then enjoy—his term being at an end—is styled an *estate at sufferance*. And, lastly, he may grant the parcel (5) to E., so long as he and E. shall will; in which case the estate created would be styled an *estate at will*. We will consider these several estates, and their respective incidents, separately.

Base Fee.—See *post*, 'Conditional Estates.'¹

Estates Tail.²—An estate tail, so called from *tailler*, to *cut* or *prune*, is an estate less in quantity than a fee simple, it being limited to the grantee and his descendants—*e.g.*, 'To A., or to A. and B., and the heirs of his, her, or their body or bodies.' When it is limited to a man or woman, and the heirs of his or her body or bodies, it is an *estate in tail-general*, for any heir of his or her body may inherit it. When it is limited more particularly—*e.g.*, 'To A. and the heirs of his body by

remainder to W. and his wife, and after their decease to their children; W. and his wife then having issue a son and a daughter:—Held, that W. and his wife had but an estate for life; and, although they had no child at the time of the devise, yet every child which they might have afterwards would take by way of remainder.' (*See Wild's Case, Tudor's L. C.* p. 581.)

¹ See *ante*, p. 352, n. 1.

² See Appendix A.

B., his wife,' or *vice versa*, or 'To A. and B., and the heirs of their bodies,'—it is called an *estate in tail-special*.¹ An estate tail, therefore, whether *general* or *special*, is clearly an estate derived from or cut off a greater, viz., the *fee simple*. It would therefore appear, having regard solely to the grammatical construction of the terms of such a grant—(1) That neither of the grantees, whether the first or successive taker, has more than a mere life-interest, and consequently that he, she, or they, as the case may be, could not alienate the land for a term exceeding his, her, or their life or lives; (2) That, upon the decease of the first grantee or grantees without the prescribed heir, or upon the decease of either of such heirs without the prescribed successor, the land must revert to the grantor or his representative, the grant being exhausted; and (3) That, should any tenant in tail happen to become possessed, either by purchase or otherwise, of the fee simple out of which the estate tail is carved, that the estate tail must, by merging in it, immediately become extinct. But such is not the case in either instance; for—

1. *Barring the Entail*.—To facilitate the alienability of realty, it is enacted, by the 3 & 4 Will. IV. c. 74, s. 15, that 'After the 31st of December, 1833, every actual *tenant-in-tail*, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in *fee simple absolute*, or for any less estate, the lands entailed;—as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by

¹ And, as to further limitation, see *ante*, p. 352.

the person making the disposition at the time of his making the same, and also as against all other persons, including the King's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail, in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this Act authorized to be made.' This Act, which apparently in effect enables the possessor of an estate tail to convert it into a fee simple—*i.e.*, to convert a smaller into a larger estate—by giving him the right to deprive the grantor of his reversion, and his heir of his inheritance, by one and the same act, technically styled *barring the entail*, did not, in fact, do more than substitute for a rude and cumbrous machinery, known as *finés and recoveries*,¹ a simple mode of doing that which for ages had been held to be the undoubted right of the tenant-in-tail; all that the Act requires to effect the conversion of an estate tail into a fee simple, being a deed (s. 40), enrolled (s. 41), and when made by a married woman, also acknowledged (s. 40). When there is a *protector of the settlement*,² his

¹ For the history of fines and recoveries, see Steph. Com. i. 249, and Taltarum's Case, Tudor's L. C., p. 605.

² PROTECTOR OF THE SETTLEMENT.—'If, at the time when there shall be a tenant-in-tail of lands under a settlement, there shall be subsisting in the same lands, or any of them, under the same settlement, any estate for years, determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail; then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being, for all the purposes of this Act, deemed the prior estate), shall be the protector of the settlement, so far as regards the lands in which such

concurrence by deed enrolled is necessary ; without it, though the tenant in tail may bar his own issue, he cannot bar estates in *remainder* or *reversion*. In other words, he can grant only a *base fee*. The reader will not fail to remark that this power of the tenant-in-tail is limited to alienation. A tenant-in-tail, though empowered, as explained, to grant his estate to another as a fee simple, has no power, under this Act alone, to convert his fee tail into a fee simple, to be retained as such by himself.¹

2. AS TO REVERSION.—From what we have already seen, it is clear that the rights of the *reversioner* are practically of little value, being entirely contingent upon the non-exercise by the *tenant-in-tail* of his right to bar.

3. AS TO MERGER.—The application of the doctrine of *merger* to *estates tail*, at one time regarded as *conditional* estates, has been expressly precluded by the construction put upon the statute *De donis conditionalibus*.² Should, then, the *tenant-in-tail* of any lands

prior estate shall be subsisting ; and shall, for all the purposes of this Act, be deemed the owner of such prior estate, although the same may have been charged or encumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner ; and that an estate *by the curtesy*, in respect of the estate-tail, or any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause ; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.' (3 & 4 Will. IV. c. 74, s. 22.)

¹ Tenants in tail can, however, and frequently do, convert their *estate tail* into a *fee simple*, thus—A., being *tenant in tail*, grants to 'B. and his heirs, to the use of B. and his heirs,' and within six months enrolls the deed. A., from the date of this deed, is tenant in *fee simple*. See *post*, Appendix A., 'Statute of Uses.'

² See *post*, Appendix A.

happen to acquire the *fee simple*, the *estate tail* will¹ not merge in it.

We now come to the consideration of the rights of a *tenant-in-tail* in respect of his estate, other than the right to bar the entail.

1. ENDURANCE.—If not duly barred, an estate tail will endure so long as the grantee or his prescribed heirs exist. It cannot, as we have seen, be extinguished by merger. Though the estate tail cannot be alienated, for it is impossible to give an estate granted 'To A. and the heirs of his body' to another, yet the tenant-in-tail can convey to another an estate in the land in which he has the *estate tail*—e.g., he can grant the land 'To B. and the heirs of his body;' but the estate so created in B. and the heirs of his body is a *base fee*, for it can continue so long only as A., the *tenant-in-tail*, and the heirs of his body, endure.¹ It is on an equality with a fee simple as to *forfeiture* and *escheat*.

2. USER.—The *tenant-in-tail* has the same uncontrollable power in the commission of waste as the *tenant in fee simple*.

3. DOWER and CURTESY.—It is subject to like dower and curtesy.

4. DEBTS.—His estate is liable to be sold for the payment of his debts to the same extent to which he would himself have had power to dispose of it; for, by 1 & 2 Vic. c. 110, s. 13, it is enacted that a judgment entered up against the debtor in any of the superior courts at Westminster² shall operate as a charge upon

¹ See Watkins, p. 112.

² By 1 & 2 Vic. c. 110, s. 13, rules of the Courts of Common Law, and decrees and orders in equity for payment of money, are placed on the same footing as judgments.

all lands, tenements, or hereditaments, of which the tenant-in-tail shall be seized or possessed, for an estate or interest in law or in equity, or over which he shall have any disposing power; and shall be binding as against him and the issue of his body, and all claimants whatever, whom he was competent, without the assent of any person, to have barred.¹

5. DESCENT.—When not duly barred, an *estate tail*, whether *general* or *special*, descends to the issue indicated by the grantor, the course of descent, so far as it goes, being similar to that of an estate in *fee simple*.

6. CARVING.—The *tenant-in-tail* may, for a term not exceeding twenty-one years,² grant a lease of any portion of the land except the *demesnes* and lands usually occupied with the principal mansion house. He cannot lease the principal mansion house. By 19 & 20 Vic. c. 120, s. 32, it is enacted that any person entitled to the possession, or to the receipt of the rents and profits of any settled³ estates, for an estate for life, or for a term of years determinable with his life, or for any greater estate, either in his own right or in right of his wife, may demise the same from time to time—

¹ To give the judgment creditor, however, any claim on the debtor's lands as against purchasers, mortgagees, and creditors, the judgment must be duly registered in the Court of Common Pleas (sec. 19). And as against purchasers and mortgagees, execution also must have issued on the judgment, and been duly registered, prior to the conveyance or mortgage. (See 23 & 24 Vic. c. 38, ss. 1, 2.)

² The twenty-one years must take effect in possession; the demise must be by deed; and the rent must be the best that can reasonably be obtained, without *fine*, and be incident to the immediate reversion. The demise cannot be made without *impeachment of waste*; there must be a covenant for the due payment of the rents, a condition of re-entry on non-payment for 28 days, or on non-observance of any of the covenants or conditions; and a counterpart of the lease must be executed by the lessee. (19 & 20 Vic. c. 120, s. 32.)

³ As to the meaning of the word 'settlement' as used in this Act, see *post*. See also 21 & 22 Vic. c. 77.

unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise—for any term not exceeding 21 years, in such form as is prescribed by the Act.

Tenant-in-tail after possibility of issue extinct.—‘It is necessary to observe that nothing which has been said concerning the alienation of *estates tail* is to be extended to the estate of that particular proprietor who is called *tenant-in-tail after possibility of issue extinct*. When it becomes impossible that any person should exist to whom the inheritance under the entail can descend, the inheritance itself ceases. But this impossibility can only arise, in contemplation of law, by the death of one of the persons from whom the inheritable issue is to proceed. Thus, if lands be given to ‘A. and the heirs of his body by B., his wife,’ or ‘To A. and B. and the heirs of their bodies,’ and B. dies, and there is no issue of their two bodies living; A., from *tenant in tail-special*, becomes *tenant in tail after possibility of issue extinct*, and has nothing more in effect than an estate *for his own life*, attended with certain privileges, the relics of his former inheritance, the principal of which is the right of *committing waste*. And if he alien his estate, the privileges cease.’¹ He is empowered, as tenant for life, to grant leases for 21 years.²

Estates for Life.³—Estates for life, or *freeholds not of inheritance*, are of two kinds; viz.—*conventional*, i.e., expressly created by the act of the parties;⁴ and *legal*, i.e., created by construction and operation of law. Of

¹ Burton, 236.

² See 19 & 20 Vic. c. 120, s. 32, *ante*, p. 358.

³ The leading case on the incidents of an estate for life is *Bowles’ case*. See Tudor’s L. C. 27.

⁴ As by deed or grant. Estates devised by will, though not strictly conventional, are included.

the former are an estate '*for one's own life*,' an estate '*pour autre vie*,' a '*quasi-entail*,' and an estate which may endure for a lifetime, but which may determine sooner.¹ Of the latter are the estate of a *tenant in tail after possibility of issue extinct*, an estate *by the curtesy*, and an estate *in dower*. As in the case of estates of inheritance in possession, the tenant is said to be '*seized in his demesne as of fee*' or '*fee tail*,' so in the case of estates for life in possession, he is '*seized in his demesne as of freehold*.'

When, in the grant of an estate otherwise than by will, words of inheritance are omitted—*e.g.*, '*I grant or devise my estate of D. to A.*,'—the grantee takes the largest estate that is not an estate of inheritance, *viz.*, an estate for life. When the grant is by will, he takes the fee simple.²

1. ENDURANCE.—An estate for life—there being no contingency—will endure as long as the life for which it is granted, unless forfeited.

2. USER.—The tenant for life is answerable for waste, both voluntary and permissive, unless the grant is expressly made *without impeachment of waste*.³ Though impeachable for waste, he has privileges that do not belong to a tenant for years.⁴

¹ If an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens—when the widow marries, or when the grantee obtains a benefice—the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life, because the term for which they will endure being uncertain, they may, by possibility, last for life—*i.e.*, if the contingency upon which they are to determine does not sooner happen. (*Steph. Com.* i. 255.)

² See post, 'The Wills Act.'

³ The grantee of an estate for life without impeachment for waste is liable for malicious waste, as by pulling down houses, &c., for in such case the Court of Chancery would grant an injunction. Such a tenant is also bound to keep the houses in repair. (*Watkins*, p. 81*.)

⁴ The tenant for life may cut underwood (*Co. Litt.* 53 a), and work

(3) **DEBTS.**—There is necessarily neither *dower*, *curtesy*, nor *descent* of an estate for life; nor can such an estate be liable after the tenant's death to his debts, except to the extent of the *emblements*,¹ which go to his executor, for, as his estate is *for life only*, he dies possessed of no realty to go to his heir. During his

open mines, and new shafts or pits to pursue the old veins. He may also work any mines lawfully opened by the preceding *tenant-in-tail*, although subsequently to the settlement under which he claims. But, if he *opens a new mine*, it is *waste*. He may also fell timber for repairs, but not otherwise; and if he sells the timber, and applies the money in repairs, it is *waste*. He is entitled to reasonable *estovers*—viz., *housebote*, *ploughbote*, and *haybote*—without assignment, unless he is restrained by covenant or agreement: 'housebote' is a sufficient allowance of wood to repair and burn in the house; 'ploughbote,' sufficient wood for repairing and making instruments of husbandry; and 'haybote,' for repairing fences, &c. He is bound to keep the buildings in repair, and to repair the *banks* and walls against the sea and rivers. And if he converts one species of land into another, it is *waste* (*Co. Litt.* 53 b), and cutting down decayed timber is also waste (*Watkins*, 80.*)

¹ Emblements are the growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator. They are deemed *personal property*, and pass as such to the executor or administrator of the occupier, whether owner *in fee*, or *for life*, or *for years*, if he dies before he has actually cut, reaped, or gathered the same; and this, although being affixed to the soil, they might for some purposes be considered, whilst growing, as part of the realty.

If a tenant *for life* dies, his executor or administrator, and if a *cestui que vie* dies, the tenant *pour autre vie*, is entitled to emblements, for the estate was determined by the act of God; and it is a maxim in the law that *Actus Dei nemini facit injuriam*. By devise, the devisee may, without express words, be entitled to the growing crops. But a legatee of the goods, stock, and moveables on a farm, is entitled to growing corn in preference as well to the devisee of the land as to the executor. So, a tenant at will or sufferance, the duration of whose tenancy is uncertain, is, if the lessor suddenly determine the tenancy, entitled to emblements. And, at Common Law, *fructus industriales*, as growing corn and other annual produce, which would go to the executor upon death, may be taken in execution; but the appraisement and sale thereof are regulated by statute; and by statute growing crops may be distrained upon, and sold when ripe. But a crop of *natural* grass growing at the time of the death of a tenant for life or in fee, and although fit to cut for hay, does not belong to his executor, but goes to the remainderman. A landlord is entitled to emblements or growing crops, in case of forfeiture by the tenant's own act, and so is a mortgagee. (1 *Chit. Gen. Prac.* 91; but see 14 & 15 *Vic.* c. 25, s. 1, p. 362.)

tenancy his estate is liable to his debts, i.e., to the extent of his interest in it.

(4) CARVING.—As to his power to lease for 21 years, see 19 & 20 Vic. c. 120.¹ Independently of this statute, the tenant for life could always grant leases terminable with his own interest, in which case his lessee was not merely entitled by the Common Law to the same *estovers* and *emblemments* as himself and his executor, but to *emblemments* in those cases where his estate was terminated by *his own act*, as well as by *the act of God*, or *the law*. When the tenancy is at a *rackrent*,² it is enacted, by 14 & 15 Vic. c. 25, s. 1, that where the tenancy shall determine by the death or cesser of the estate of any landlord, the tenant shall, instead of claims to *emblemments*, continue to hold until the expiration of the then current year of his tenancy; and shall then quit upon the terms of his lease or holding, in the same manner as if his tenancy were determined by effluxion of time, or other lawful means, during the continuance of his landlord's estate; and the succeeding owner shall be entitled to recover—as the landlord could have done if his interest had continued—a fair proportion of the rent for the period elapsed from the termination of the landlord's interest to the time of quitting; and the succeeding owner and tenant respectively shall be entitled, as against each other, to all the benefits, and be subject to the terms to which the landlord and tenant respectively would have been entitled or subject in case the tenancy had determined

¹ See *ante*, p. 358.

² 'RACKRENT' is a term expressive only of the proportion the rent bears to the value of the tenement on which it is charged; where it is of the full value of the tenement, or near it, the rent is said to be a '*rackrent*.'

in manner aforesaid, at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party, to determine any such holding and occupation, as aforesaid.'

Chattel Interests.—Every estate or interest in land, less than a freehold, is styled a *chattel interest*,¹ or *chattel real*; and is either a *term*—otherwise styled an *estate for years*, an *estate at sufferance*, or an *estate at will*.

Terms or Estates for years.—An *estate for years*—i. e., for a term of years—is styled a *term*, because its duration is absolutely defined.

ENDURANCE.—It is, therefore, of the essence of a term that it must have both a certain beginning, or definite commencement, and a certain or definite period beyond which it cannot last. The reader will not forget the maxim, *Id certum est quod certum reddi potest*.² But though it is essential to its very exist-

¹ They were originally so called because then considered as interests insignificant in value, the long terms with which we are now familiar, being unknown. They still retain their legal rank: hence the anomaly which holds a term for 999 years as a legal estate to be inferior to an estate for life, say at the outside the odd 99 years.

² The commencement of leases for years may be considered either with regard to the time of the computation of the term, or the commencement of the interest. The certainty of the time of computation may be fixed by reference, either to the time of the making of the lease, or to a past or future period, or a past or future event; and the event, if future, may be contingent; or such time may be referred to the nomination of a third person, in which case it must be fixed in the lifetime of the parties to the lease. When no time of computation is referred to, or the time referred to is an impossible date, or when a lease is made to begin from the end of a lease which is misrecited, the commencement will be computed from the delivery of the lease. The commencement in interest, when the time of computation is immediate, or from a past period, may either begin immediately, or be postponed to take effect at a future period, or on a future event, either absolute or contingent; but when the time of computation is from a past period, the commencement in interest cannot be retrospective, so as to take effect before the making of the lease. When the time of computation is future, the commencement in interest cannot, of course,

termini may be granted over. Or, if a lease be made to two, one may release to the other before entry.¹

7. CARVING.—*Under-leases*.—As a lessee, unless restrained by express covenant, may grant over his whole term, so he may, there being no covenant to the contrary, make an *under-lease* of a part of his interest. As, if he has a term for ten years, he may underlet for five. An *assignment* for less than the whole term is in fact an *under-lease*.² On the other hand, any *assurance* purporting to be an *under-lease*, but which comprises the whole term, is, by the better opinion, in fact an *assignment*.³

8. DESCENT.—A lease for years, however great the number may be, cannot, by the agreement of the parties, be made to the *heirs* of the lessee, nor entailed on the *heirs of his body*; and therefore, if a lease be made to 'J. S. and his heirs,' or 'to J. S. and the heirs male of his body,' the executors of J. S., and not his heirs or heirs male, shall have it, and may sell the term.⁴

An Estate at Will.—An estate at will—the lowest estate which can arise by the *agreement* of the parties—is not bounded by definite limits with respect to time; but as it originates in *mutual agreement*, so it depends upon the *concurrence* of both parties.

1. ENDURANCE.—As it depends upon the *will* of both, which it does by implication of law, even where it is expressed to be at the will of one only,⁵ the dissent of either may determine it. Such an estate cannot consequently be the subject of conveyance, and it must

¹ Watkins, 35.

² *Cottee v. Richardson*, 7 Ex. Rep. 143.

³ See Williams' R. P. 388.

⁴ Smith's R. & P. Property, 205, 2nd ed.

⁵ Co. Litt, 55 a.

determine by the death of the lessee, without conferring any title on his personal representative to hold the land. Should the lessee introduce a stranger into the tenancy, with the assent of the lessor, it would not be a transfer of the lessee's interest or estate; for his interest or estate would be, by the very act, determined; but a new *estate at will* would be created. The law does not favour the creation, by construction alone, of an *estate at will*; and consequently, if the rent is reserved yearly or half-yearly, it frequently takes the circumstance as evidence of a term, *i.e.*, of a lease for a year, or from year to year. As such presumption, however, is merely for the furtherance of natural justice, that he who sows may reap, it is not admitted when its effect would be to work an injustice, for it is a maxim that '*A construction of law, as such, shall do injury to none.*'

By 29 Car. II. c. 3, s. 1, it is enacted, that a lease by parol for a longer term than three years shall have the force and effect of an *estate at will* only. When, therefore, a person leases lands to another by parol, without expressing the time for which the lessee is to hold, the law will avail itself of the circumstances which the demise presents, in order to construe such a lease as creating a tenancy for a *year*, or from *year to year*, rather than a tenancy *at will*,¹ but where a person leases lands to another by parol for a longer space of time than three years from the making of such lease, the statute interferes by declaring it an *estate at will*, and precludes us from saying that it is not an *estate at will*, but a tenancy for a *year*.²

¹ See *Richardson v. Langridge*, Tudor's L. C. p. 4.

² *Watkins*, 1—7; but see *Doe d. Rigge, v. Bell*, 5 T. R. 471; and

(2) **USER.**—A tenant at will may not commit any kind of *voluntary waste*, but is not punishable for *permissive waste*, for he is not bound to repair.¹

An Estate at Sufferance.—A tenancy *at sufferance* is the lowest estate that can subsist; it arises where a person has held by a lawful title, and continues his possession after his estate is determined, without either the agreement or disagreement of the person then entitled to it. As where a tenant at will continues in possession after the death of the lessor, or a lessee for years holds over after the expiration of the term, or the tenant for another man's life keeps possession after the decease of the person for whose life he held: in all these cases the tenant remaining in possession, without the consent or dissent of the person entitled to enter, becomes tenant *at sufferance* to the latter.² This tenancy, therefore, can arise only by *construction of law*, and cannot originate in the agreement of the parties. It cannot arise by *act of law*.³ There being no dissent, the possession of the tenant is not *adverse* to the title of the person entitled to enter, although such person may, if he chooses, consider it so.

If the person entitled actually agrees to the continuance of the possession, a *tenancy at will*, or *from year to year*, will arise between them, according to the nature of the agreement. The payment of an

Clayton v. Blakey, 8 T. R. 3, in which it is held that such a lease endures as a tenancy from year to year, notwithstanding the statute declares that it shall have the effect of an estate at will only.

¹ 1 Cruise, Tit. 9, c. 1, s. 11.

² See Rouse's case, Tudor's L. C. p. 1.

³ Where a person comes to a particular estate by *act in law*, and continues to hold it beyond the proper time—as if a guardian, after the full age of the heir, continues in possession—he is not a tenant at sufferance, but an abator. (*Co. Lit.* 271 a.)

annual rent, where there are no circumstances attending the payment and receipt of it to oppose such a construction, will also raise a constructive tenancy from year to year; but so long as the occupation is merely continued, with the bare acquiescence or without the disagreement of the person entitled to the possession, a tenancy *at sufferance* subsists.

It appears to be essential to the raising of a tenancy *at sufferance* that the person in possession should have originally held by *lawful* title. And it is clear that, as a tenant at sufferance has nothing but the bare possession without any title, he has no estate which he can convey, or which can descend.¹

As to what and when estates in realty will be created or granted by *implication*, see *Gardner v. Sheldon*.²

In the case of the Crown, there is no *tenancy at sufferance*; and, if the King's tenant holds over, he is an *intruder*.

¹ Watkins, 23 *et seq.*, where see his comments on *Doe v. Perkins*, 3 Maul & Sel. 271.

² Tudor's L. C. p. 541.

CHAPTER VII.

ESTATES IN REALTY—THE QUALITY OF INTEREST—
CUSTOMARY ESTATES.

WE have already said that customary estates are divided into three classes; viz., *copyholds*, *customary freeholds*, and *ancient demesnes*. The term copyholds may be regarded as the generic term describing the three, of which the last two are but species. We will therefore, for the present, use the term copyholds¹ as applying generally to the three.

¹ 'Copyholds,' says Mr. Serjeant Wright, 'are the remains of villenage, which, considered as a tenure, was not entirely Saxon, Norman, or feudal, but a tenure of a mixed nature, advanced upon the Saxon bondage, and which gradually superseded it; so that we must look partly at home for its original. . . . If the Normans found, as we are assured they did, "a sort of people among us, who were," as Sir William Temple says, "in a condition of downright servitude, used and employed in the most servile works, and belonged—they, their children, and effects—to the lord of the soil, like the rest of the stock or cattle upon it," nothing is more likely than that they who were strangers to any other than a feudal state should enfranchise all such wretched persons as fell to their share, by admitting them to fealty, in respect of the little livings they had hitherto been allowed to possess, merely as the scanty supports of their base condition, and which they were still suffered to retain upon the like services as they had in their former servitude been used and employed in; but this possession, as now clothed with fealty, and by means thereof advanced into a kind of tenure, differed very much from the ancient servile possession, and was from henceforth called villenage.'

'Our Saxon ancestors again having, as above, submitted to the feudal law, which was a law of liberty, may be supposed to have imitated, some sooner than others, the generosity of the Normans, and to have done the like; but neither did our Saxon or Norman ancestors mean to increase or strengthen the possession of their vassals, but meant to leave that altogether as dependent and precarious as before,

Copyhold Estates.¹—To realise the period of, and circumstances attending, the origin of these estates, is the first step towards their comprehension. We have to reflect upon the existing state of things when the entire population of England was but about 2,000,000; when its soil was parcelled out into comparatively few but huge estates, called manors; when its population consisted of, practically, but two classes, the freeman and the slave (villeins); when the lord was virtually regal within his manor, demanding fealty and homage from his freemen, servile obedience from his villeins, upon whom he looked much in the same light as upon his cattle—and who, indeed, in the eye of the law, had but few more rights; that, like the rest of his cattle, they might graze and breed, he penned off plots of land upon which he allowed each, with his wife and offspring, to settle. Need it be said, that in the eye of the law the estate of such a tenant, if indeed his interest could be dignified with the name of estate, was the meanest recognised by the law—an estate at will. Such they

save only that, as by their admission to fealty their possession was put, in some measure, upon a feudal foot, their lords could not, in regard to the fealty implied on their parts, deal with them so wantonly as before; nor could they, so long as they answered the services and conditions of their possessions or tenure, in honour or conscience deprive or remove them; and yet they were for a long time left merely to the conscience of their lords, which they might, as they could, awaken by their petitions, but could not otherwise deal with, until the uninterrupted benevolence and good-nature of the successive lords of many manors, having time out of mind permitted them, or them and their children, to enjoy that possession, in a course of succession or for life only, became at length *customary* and binding on their successors, and advanced such possession into the legal interest or estate we now call *copyhold*, which yet remains subject to the same servile conditions and forfeitures as before, they being all of them so many branches of that continuance or custom which made it what it is. (*Wright's Tenures*, pp. 215—221.)

¹ In Mr. Scriven's *Treatise on Copyhold and Tenure*, pp. 65—72, is to be found a list of the Real Property Statutes that do and that do not affect customary estates.

were, and still are in legal contemplation, though, by a strange anomaly, custom has been permitted to give to them many of the incidents of other legal estates ; the result being that the law now recognises *fees simple*, *fees tail*, *estates for one's own life*, or *pour autre vie*, and estates *at sufferance*, in copyhold lands, each being, however, to a certain extent qualified by or subject to the peculiar customs of the manor of which it forms, or originally formed, a part.

That these little holdings were originally absolutely at the will of the lord, cannot be doubted. That the villein should have continued in the enjoyment of his grant so long as he discharged his duty to his lord, tended his flocks, ploughed his lands, or carted his manure, was but natural. That, upon the death of the father, the original grantee, his son or sons, should—they being able to discharge those duties—be allowed to retain possession of the same hut and land, and that some note or memorandum should be made, both of the fact of the death and of the name of the successor or successors, was no less so. That, when there was reasonable ground for so doing, the lord or his steward should permit a tenant to surrender his holding either absolutely or in favour of another, and this especially in proportion as the status of the villein became changed from that of slave to labourer, is no less reasonable than that the imposition of some trifling fine upon the old or new tenant should be levied by way of acknowledgment for the favour. That the successive lords or their stewards, when a death occurred or an alienation was desired, should refer to the roll, to see what had been the practice in like cases, and simply follow it, is precisely what, without any authority to that effect, we

should have supposed. The result being that the *will* of the lord, which had originated the custom, came at last to be controlled by it, for with most men it is a maxim that the 'what' and the 'how' that has always been, is and must be right. Take an example of the effect of time upon habit, which, when it has sufficiently endured, we call *custom*. Britton, writing in the reign of Edward I. (1272—1307), says, 'Villeinage is to hold part of the demesnes of any lord, entrusted to hold at his will by villein service to improve for the advantage of the lord. . . . In manors of ancient demesne there are pure villeins of blood and of tenure, who may be ousted of their tenements at the will of their lord.'¹ In the Year Book, 43 Edward III. (1370), 25 *a*, we find a case justifying an entry made by a lord on his copyholder, because he did not do his services, and thereby broke the *custom* of the manor. This shows that the lord could not, at that time, have ejected his tenants without *cause*.

In the reign of Edward IV. (1461—1483) the judges allowed to copyholders the action of trespass, on ejection by their lords, without *just cause*.² 'Now,' says Sir Edward Coke (1549—1634), 'copyholders stand upon a sure ground; now they weigh not their lord's displeasure; they shake not at every sudden blast of wind; they eat, drink, and sleep securely, only having a special care of the main chance, namely, to perform carefully what duties soever their tenure doth exact and custom doth require; then let lords frown, the copyholder cares not, knowing himself safe.'³

We appear justified in describing the various kinds of copyhold estates as *quasi fees simple*, *quasi estates*

¹ Britton, 166.

² Co. Litt. 61 *a*.

³ Co. Cop. s. 9.

tail, &c., a mode of designation which would be perhaps unexceptionable, were it not for the fact that the term *quasi estates tail* has, as we have already seen, been applied to a particular species of *life estate*. However, the mere suggestion may assist in giving these estates a somewhat definite place of their own in the mind of the reader.

‘By the term *customary estates*,’ says Mr. Burton, ‘we mean those to which the title is not only modified but altogether constituted by *custom*. Such are to be found in many manors ; and though the customs of these manors are almost infinitely diversified, they have yet all some common features, which the law recognises as forming a uniform system, and may be said to have adopted into its own body. The lands to which these customs relate are called *customary lands*, but, subject to the estates in them which the custom confers, they are held also by the lord under the Common Law as part of the *demesnes* of his manor. For these customary estates were, in their origin, mere tenancies *at will*, though, by long indulgence, they have in many instances acquired the character of a permanent inheritance ; and as tenancies *at will* they continue to be considered in all questions relating to the *legal*, as distinguished from the *customary*, property in the land.’

‘The great criterion of a *customary estate* is, that all alienations of it must be transacted in part, at least, in the *lord’s court*.¹ Hence the proper evidence

¹ But see 4 & 5 Vic. c. 35, ss. 88 to 90. The Court of which we here speak, must not be confounded with the Court Baron, properly so called ; for, though it commonly happens that they are held at the same time, and that the same Roll serves to record the proceedings of both, the two courts are of a nature essentially distinct. To the Court Baron, the freeholders of the manor are

of title to such estates are the *court roll*, or *copies of the court roll*; ¹ from which the tenants of them are, in general, denominated *copyholders*, and the estates themselves *copyholds*.²

We will now consider the several estates in copyhold lands, and the present rights of the tenants, in the order adopted in the case of legal estates, praying the reader to remember :

I. That as it is the *custom of each manor* which regulates the kind of estate that exists, or can exist, in its copyhold lands, one kind of estate is to be found in one manor, and another in another.

II. That there are two sorts of *copyhold customs*—viz., (1) 'GENERAL CUSTOMS,' which extend to all manors in which there are copyholders, which are warranted by the Common Law, and of which the Courts take notice without their being specially pleaded ; (2) 'PARTICULAR CUSTOMS,' which prevail in some manors only, and which must be *specially pleaded*. These

suitors, as *judges* ; to the customary court, the copyholders are suitors, not as judges, but as *assistants* to the lord, or his steward, one or other of whom alone exercises the judicial authority. Though there should happen a failure of suitors to the court baron—and consequently, in strictness of law, an extinction of the manor,—yet, for all purposes to which the customary court is applicable, the original jurisdiction will continue. (*Burton, Comp.* 390 ; see 4 & 5 Vic. c. 35, s. 86.)

¹ THINGS DEMISABLE BY COPY.—It would seem that even a manor may be demised by *copy*. A mill, tithes, common appendant, common of pasture without land, a rent charge, or a rent seek, underwood, herbage, fore-crop, or prima tonsura ; and an advowson, fair, market, or piscary, where appendant. It is laid down in some books of authority, that advowsons in gross, and even rents, commons in gross, and the like incorporeal hereditaments, cannot be held by any manner of service, and therefore are not grantable by copy, although it is admitted by the same authority, 'that what things soever are parcel of the manor and are of perpetuity,' may be granted by copy. Sir Edward Coke says, that a grant may be made by copy, of twenty loads of wood, to be taken by the grantee. (*Scriven, s.* 84.)

² *Burton's Comp.* 389.

latter are construed strictly. When a custom goes to the making and maintenance of a copyhold estate, it is to be taken favourably; but all customs in deprivation or bar of a copyholder's estate are to be construed strictly.¹

III. The customs must be *immemorial*, *reasonable*, and *certain*, or they cannot be supported. If any part of the custom is bad, it avoids the whole.²

IV. The rights of lords of manors to *fines* and *heriots*, *rents*, *reliefs*, and *customary services*, together with the lord's interests in the timber growing on copyhold lands, having proved productive of considerable inconvenience to copyhold tenants, without being of commensurate advantage to the lords, the legislature³ has interfered, not merely to facilitate the commutation of their rights, but the complete enfranchisement of copyhold lands; and at last, by the Copyhold Acts of 1852 (15 & 16 Vic. c. 51) and 1858 (21 & 22 Vic. c. 94), has made the enfranchisements of copyholds compulsory, at the instance either of the tenant or the lord, fixing at the same time the mode of ascertaining the compensation to which either is entitled, so that it is probable that, in the course of time, copyholds will become matters merely of historical interest.

EVIDENCE OF THE COPYHOLDER'S INTEREST.—The rights of the copyholder depending almost entirely upon custom, or immemorial usage, it is obvious that the legal evidence of that custom, be it what it may, is

¹ Scriven, 24.

² Scriven, p. 19; where see examples of customs that have been held good or bad.

³ See 4 & 5 Vic. c. 35; 6 & 7 Vic. c. 23; 7 & 8 Vic. c. 55; 14 & 15 Vic. c. 53; 15 & 16 Vic. c. 51; 21 & 22 Vic. cc. 53, 94; and 23 & 24 Vic. c. 81.

the first thing to be sought. By this evidence, the quantity, the quality, and the incidents of the interest must be determined; for, *e. g.*, If the tenement has formerly been enjoyed as a *copyhold of inheritance*, it may be granted either *in fee* or for any *less estate*; though, if it has only been granted anciently for a less estate, the limit thus fixed by usage cannot be exceeded.¹

COURT ROLLS.—The peculiar evidence of the copyholder's title is, as already stated, the original Rolls or Books of the Court. The primary evidence, therefore, is the Court Rolls themselves. The legal secondary evidence is a copy² of the Court Rolls duly stamped.³ In addition to the Court Rolls, or Copy Court Rolls, evidence is admissible in explanation of either. And, lastly, general reputation within the manor may also be evidence of a custom where the Court Rolls are silent.⁴

Copyhold Fees Simple.—ENDURANCE AND USER.—The

¹ Burton, 415.

² These may be copies under the steward's hand, or ordinary sworn copies. And it seems that, after thirty years, the steward's signature will be presumed to be genuine. (*Wynne v. Tyrwhitt*, 4 B. & A. 376.) A person who has a good *prima facie* title to a copyhold, may obtain a *mandamus*, by which the lord will be compelled to allow him to inspect and take copies of the Rolls. (*R. v. Shelley*, 3 T. R. 141.)

³ By 33 & 34 Vic. c. 97, sec. 81, it is enacted,—(i.) that 'the copy of Court Roll of a surrender or grant made out of Court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor on the face of such copy shall be sufficient evidence. (ii.) The entry upon the Court Rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, if made out of Court, or the memorandum thereof, or the copy of Court Roll of the surrender or grant, if made in Court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence.' See secs. 82 to 86, and schedule 'Copyhold and Customary Estates.'

⁴ Doe v. Sisson, 12 East, 62.

tenant of a *fee simple* in *copyhold lands*, has not the *freehold*. He has, therefore, no right to the mines, nor the timber. He is liable to forfeiture¹ by waste,² by refusal to attend the customary court, to perform any other service, to pay any rent or fine, incident to the tenure, or for alienating³ his tenement in any manner contrary to the nature of the customary tenure. The lord may become absolutely entitled by *forfeiture* for either of the above causes; by *escheat*, or by a *surrender* to his use made by the tenant.

DOWER AND CURTESY.—The rights of dower and curtesy are not necessarily incident to copyholds. When dower—which, in connection with copyhold lands, is called the *widow's free bench*—does attach, it often extends to the whole tenement, instead of to a third part of it. In many manors, it is held during *widow-hood*, in others, during *chaste widow-hood* only. It is, in general, confined to the property of which the husband

¹ The lord may recover the forfeited estate by ejectment, without prejudice to the copyholder, if any, in reversion or remainder. The tenant cannot here question the title to the manor of the lord by whom he was admitted. But the lord may, in general, waive the forfeiture by a subsequent act of recognition of the tenant. If he neglects to take advantage of the forfeiture in his lifetime, his heir cannot avail himself of it. (*Burton*, 414.)

² Waste, to be attended by such penal consequences, must be either an invasion of the lord's property, as by cutting down trees, without being authorised by the custom; or some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity—*e. g.*, by making enclosures, or other alteration of boundaries. (*Burton*, 413.)

³ Alienations made by the tenants of particular estates in customary property, do not divest the estates of the person in remainder or reversion, and have no effect of forfeiture for their benefit. But every alienation which is contrary to the nature of the customary tenure, works a forfeiture of the estate to the lord. If the words of an assurance will bear two constructions, that is to be preferred which renders the act lawful, and therefore, in a general conveyance of lands and tenements, copyholds are held not to be included. It is otherwise in the case of a will. (*Burton*, 412.)

died seised, and is consequently no obstacle to alienation. The estate, being regarded as a continuation of that of the deceased, is perfect without admittance.¹

DEBTS.—They are liable equally with the tenant's freeholds for his debts.²

ALIENATION.—The tenant has the right to alienate. The ordinary mode of alienating a copyhold estate in fee-simple, is by *surrender and admittance*; of which the most simple form is as follows:—The copyholder appears personally in Court, and, by whatever ceremony the custom of the manor may have prescribed, professes to surrender or deliver up his land to the lord, whether in his own person, or, what is more usual, as represented by his steward, expressing the surrender to be 'to the use of A. and his heirs'; whereupon A. is with due ceremony *admitted* tenant of the land, 'to hold to him and his heirs at the will of the lord, according to the custom of the manor.' He then pays a *fine*³ to the lord, and also, if required, does *fealty*. All these circumstances, or at least the *surrender and admittance*, are entered on the roll; and the new tenant, paying his fees to the steward, receives a copy of this fundamental document of his title.⁴

CARVING.—By the like process of *surrender and admittance*, the copyholder, without alienating his entire interest, can surrender to what *uses*⁵ he may think fit, they not being illegal; but the words of limitation in

¹ Burton, 409.

² See *ante*, p. 351, n. 1.

³ **FINES.**—The fine is a debt due to the lord from the heir or devisee. It does not accrue due until admittance. When the custom has not ascertained the amount of the fine, the King's Courts of Law, in which alone it can be recovered, will not suffer it to be raised beyond two years' improved value of the land. (*Burton*, 406, 407.)

⁴ Burton, 390.

⁵ See 'Alienation in Trust.'

the surrender must be the same as those which would be required for a like purpose in the conveyance of freehold lands, unless the peculiar custom authorises a variance; *e.g.*, he can mortgage by surrendering to the use of the mortgagee, upon condition &c.; he can surrender to the use of another for life, or for a term, to the use of his wife, or to his own use; he can create *springing* and *shifting uses*.

DESCENT.—The general rules of descent are the same in copyhold as in freehold inheritances when not varied by peculiar local custom, as for example in the case of *Borough-English* or *Gavelkind*.¹ But these rules must not be followed in any respect to the prejudice of the lord.² In the case of copyholds, as in that of freeholds, the heir takes by descent and not by purchase, *i. e.*, where the two rights meet in him; but by 3 & 4 Will. IV. c. 106, s. 3, when an estate is devised to the heir, he takes as devisee, and not by descent. Upon the decease of the tenant, the lord is entitled, not merely to the *fine* from his *successor*, but also in some cases to a *heriot*³ from his *personal representative*.

¹ See Burton, 392-397; Williams, R. P., 367, 368.

² Burton, 408.

³ Scriven, 37.

⁴ HERIOTS.—The heriot which becomes due to the lord upon the death of his tenant out of the personal estate of the latter, appears to have been originally a tribute to the lord, of the horse or habiliments of the deceased tenant, in order that the *militie apparatus* might continue to be used for the purposes of national defence by each succeeding tenant; it was natural, therefore, that on the decline of military tenure, the heriot should be commuted for a payment in money, or for the tenant's best live or dead chattel. But it should seem that the payment in money was usual in the time of Henry II., and of John, and in Normandy before the Conquest; and that the heriot of the villein or husbandman was more usually the best beast. According to some writers, the heriot of the best beast is not in all cases a commutation or substitution for the military heriot, but was originally rendered by the villein or husbandman for the purposes of agriculture, in analogy to the warlike heriot on the death of a military tenant.

Customary Freeholds.¹—In the north of England, and in some other parts of the kingdom, are to be found lands held by *copy of court roll*, but not expressed to be *at the will of the lord*, but only *according to the custom of the manor, by copy of court roll*; hence their denomination *customary freeholds*. Though distinguished in this particular from *pure copyholds*, which are expressed to be *at the will of the lord of the manor, according to the custom of the manor, by copy of court-roll*; the *freehold*, as in the case of *pure copyholds*, is held to be in the *lord* and not in the *tenant*; ² hence the right to mines and timber belongs to the lord.³ Furthermore, these lands are parcel of the manor.⁴ Nor can the tenants generally grant leases without the lord's consent;⁵ and though, in some cases, a deed of '*bargain and sale*' is employed, yet the assurance is imperfect without *admittance* in the lord's court.⁶

Copyhold Estates-tail.—The statute De Donis is held not to extend to copyholders; and therefore, if a

In the opinion of others, the heriot was a voluntary or gratuitous bequest of the tenant. The better opinion is that they were the lord's legal rights, and were so considered, even in the time of King Canute.

In some manors it is customary to render to the lord the best beast of which the tenant dies possessed; in others, the second best beast; in others, the only beast, if but one; or, if the tenant has no beast, then to pay a fixed sum in lieu of heriot; in others, to render the best beast or good, or to pay a sum certain at the election of the lord, &c. The *heriot service* being a reservation by the lord upon his feudal donation, and arising from the tenure between the lord and tenant, is in the nature of a *rent*, which lies *in render*. The remedy was therefore originally, and still is, by distress. (*See Scriven, 252.*)

¹ To this species belongs what is termed *ancient demesne*, which consists of lands held of manors that were formerly in possession of the Crown. (*See Co. Litt. 59, b. n. 1.*)

² *Stephenson v. Hill*, 3 Burr. 1278.

³ *See Doe d. Reay v. Huntington*, 4 East, 271.

⁴ *Burrell v. Dodd*, 3 Bos. & Pul. 378, 381.

⁵ *Doe v. Danvers*, 7 East, 299.

⁶ *See Burton*, 398.

copyhold estate is limited '*to A. and the heirs of his body,*' this is not necessarily an *estate tail*. In the absence of a special custom to that effect, the estate will be of that kind which at the Common Law is styled a *fee-simple conditional*, and which, before the statute De Donis, was created by those words. In many manors, however, a custom of entailing copyholds has prevailed.¹

It is unnecessary to particularize the estates in copyhold of less interest ; what has been already said being sufficient to indicate their peculiar characteristics.

¹ Burton, 398.

CHAPTER VIII.

ESTATES IN REALTY—THE QUALITY OF INTEREST,
LEGAL OR EQUITABLE.

HAVING particularized the various *legal*, as distinguished from *customary* estates in realty, known to our law—no others exist or can be created—and endeavoured to show the quantity of interest enjoyed by the possessor of each; we now come to consider the same estates from a second point of view, viz., the *quality* of the interest enjoyed by the tenant of either. As to its *quality*, every estate is either both *legal* and *equitable*, or merely *legal*, or merely *equitable*. When the tenant has both the *legal* and the *equitable* estate, he has the right both to the possession and to the beneficial enjoyment of the estate, as well at law as in equity. When he has merely the *legal* estate, he is entitled to the *possession* but not to the *beneficial enjoyment* of the estate. His possession is that of a *fiduciary*. He holds simply for the benefit of another. When he has merely the *equitable* estate, he has not the *legal* and *possessory* title, but he has the *beneficial interest*. The fruits of the estate are his. Every tenant therefore rightly in the possession—whether personal, or by his representative—of an estate, is so possessed, either for his own benefit, or for that of another. He is either the *proprietor*, at least for the time being, or the *trustee*.¹

¹ See *post*, 'Alienation in Trust'; and for the history of the creation Equitable Estates, see Appendix A.

CHAPTER IX.

ESTATES IN REALTY—THE NUMBER AND RELATION
OF THE TENANTS.

WE now come to the consideration of the effect of granting an estate for one and the same time to one or more individuals. As preliminary to this inquiry, we recall to the reader's attention what has been said as to the various modes of acquiring estates in realty, and particularly to the distinction between acquisition by *purchase* and acquisition by *inheritance*. The point of immediate importance to us is that, when the title is acquired by *purchase*—that is, either by *sale or purchase*, in the *popular* acceptation of the term ; or by *pure gift*, which is equally title by purchase in the *technical* sense of the term,—it becomes the province of the law, not merely to determine what estates can exist in realty, and what are the incidents of those several estates, but to decide which of them has been conferred upon the grantee by the words employed in his deed of grant. This fact must be determined by the ordinary rules of construction. In the case of acquisition by *inheritance*, the province of the law is to determine who are entitled to the estates of the deceased by the rules of *inheritance* or *succession*.¹ When the right is found to accrue to a single individual, the duty of the law is discharged by

¹ See *post*, 'Succession.'

determining who that individual is ; but when it accrues to several, it not merely determines who they are, but the relation in which they shall stand to each other, as possessors and proprietors of the estate in question. In considering the question of the number and connection of the tenants, the natural division of the subject is into two branches, viz., '*title by purchase,*' and '*title by operation of the law.*' And as, in either branch, the title must accrue either to a single individual or to more than one, the whole question may be advantageously arranged under three heads ; viz.,—(1) Title by *severalty*—i.e., where a single individual is entitled either by operation of law or by purchase ; (2) Title by *operation of law*, there being *more than one* ; and (3) Title by *purchase*, there being *more than one*. Treated in this manner, '*tenancy in severalty*' furnishes two cases, viz.,—(i.) where the acquisition is by *operation of law*, and (ii.) where it is by *purchase*. Tenancy by operation of law, there being more than one tenant, furnishes the single instance of *coparcenary*. Tenancy by purchase furnishes (i.) '*joint tenancy,*' (ii.) '*tenancy in common,*' and (iii.) '*tenancy in entirety.*'

Tenancy in Severalty.—Concerning tenancy in severalty, it is sufficient to say, that one individual is the *sole* tenant of the estate, which he holds in his own right, no other being joined with him. He is said to hold in *severalty* ; consequently his rights are defined, so soon as his estate and the nature of his tenure are determined.

Coparcenary.—When the owner of an estate of inheritance has not alienated it by deed or will, 'his eldest or only legitimate son is, in all cases, the heir by the common law. By the custom of *gavelkind*, which pre-

vails in Kent, all the sons are heirs equally. By the custom of *Borough English*, the youngest son is heir. In all cases where a person is dead, who if living would inherit, his lineal heir (if any) represents him, and is heir in his place. If, in the case of Common Law descent, there is no son, nor son of a son, *all the daughters* take the inheritance. They are said to make but *one heir*, and as such are styled *coparceners*. Coparcenary, then, exists amongst males in the case of gavelkind lands, and amongst females in the case of inheritance by the Common Law. What, then, is the relation established by the law between coparceners, and what the rights of each coparcener? In technical language, coparceners are said to be '*seised per my (mie)*', and not *per tout*, and to have *unity of interest, title, and possession*.'

The word '*seisin*,' as already explained, signifies the holding or possession of the freehold. The expression '*per my (mie) et per tout*' signifies *by the half and the whole*.

The result of this relation is, that coparceners may convey to each other either by *release*, by *feoffment*, or by *grant*, or to strangers by any conveyance that will pass the freehold, or they may *covenant to stand seised*, but they cannot *exchange* with each other till partition. As, however, this kind of companionship in estate is created by the Common Law independently of the parties, the law provides for its dissolution. Either one or more of the coparceners may compel the rest, by a writ *De partitione faciendd*,¹ to make partition; or, if they all

¹ This writ, by 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, is made also applicable to the cases of *joint tenants* and *tenants in common*. See 31 & 32 Vic. c. 40, entitled 'An Act to amend the Law relating to Partition.'

agree, they may do so voluntarily, and the mutual allotment of their shares in severalty will be valid and binding.¹

It is hardly necessary to observe that, so long as the coparcenary obtains, the coparceners are entitled to equal distribution of the fruits of the estate.

Should no partition or alienation take place prior to the death of a coparcener, her share descends to her heir, who holds it also as coparcener. For, not being seized *per tout* as well as *per my*, there is *benefit of survivorship*, as in the case of *joint-tenancy*.

Joint-Tenancy.—When an estate is granted to *two or more* persons, there being no words in the grant to prevent such a construction, the law construes the grant to be to them as *joint-tenants*. As joint-tenants they have an '*unity of interest*,' '*title*,' '*time*,' and '*possession*.' They are said to be seized *per my (mie) et per tout*; that is, each is seized of the whole. As a consequence of which, as they severally drop off by death, the survivors, and ultimately the survivor, retains the whole interest, and then holds in *severalty*. But though an estate may be granted to A., B., and C., as *joint-tenants*, or so granted that the law declares them to be *joint-tenants*—in either of which cases all the incidents of joint-tenancy attach—they do not necessarily remain joint-tenants.

As joint-tenants, being for all purposes seized *per mie et per tout*, they cannot of course *grant*, or *bargain and sell*, or *surrender*, or *devise* to each other; nor can they, for the same reason, *exchange* with each other, nor can one of them *enfeoff* his companion; one may, however, *release* to his companion. As the right of alienation is

¹ Burton, p. 113.

an incident of property, though one *joint-tenant* cannot grant to his *joint-tenant*, for that would be to attempt to give him what is his already, he can grant his interest in the estate to a stranger, or he may exchange with a stranger, or he may surrender to the immediate reversioner. So, as already said,¹ by statute he can compel a partition. The consequence of either act being to destroy the *unities*, the joint tenancy is, upon the occurrence of either, at an end.²

Tenancy in Common.—Tenants in common, like joint-tenants, take by *purchase*—that is, not by *descent*. Unlike joint-tenants, they hold by distinct titles, and have separate freeholds. They are seized *per my* and not *per tout*. They have, consequently, no right of survivorship, nor any necessary *unities* of *time* or *interest*, though they may have such unities. Tenancy in common may be created by dissolving the *unities* of *joint-tenants* or of *coparceners*, or by *express limitation*—in which instance, as the law in the case of a grant to A., B., and C., presumes joint-tenancy, such presumption must be expressly negatived, as, for example, by the use of the phrase, '*To hold as tenants in common, and not as joint-tenants.*'

Tenants in common may transfer their respective shares to strangers by the usual mode of conveying freehold property. They may compel a partition among themselves.³ But, as their possession is undivided till partition, it is said that '*none knows his own severalty*;' consequently, they cannot *exchange* with each other. They may, however, either together or sepa-

¹ See *ante*, p. 390, n. 1.

² See Morley v. Bird, Tudor's L. C. p. 778.

³ See *ante*, p. 390, n. 1.

rately, *exchange* with a *stranger*. One tenant in common may *enfeoff* or *grant* to the other, because the seisin of each is distinct. The tenant in common is not said, like the joint-tenant, to be *seised of*, or to have a title to, the whole land, though the whole is in his occupation. For the same reason one may *devise* his part to the other, but for the same reason he cannot *release* to the other.¹

Tenancy by Entireties.—Where an estate is conveyed or devised ‘*to a man and his wife during coverture,*’ the man and his wife are said to be tenants *by entireties*. Each is seised *per tout*, and not *per my*.

¹ See *Morley v. Bird*, Tudor’s L. C. p. 778.

CHAPTER X.

ESTATES IN REALTY—THE TIME OF ENJOYMENT.

HAVING endeavoured to show the quantity of interest enjoyed by the possessor of estates in realty, and having pointed out that the possessor of the largest interest, can, out of that interest, carve any less interest—an estate *at sufferance* excepted—and that he can confer such smaller estate upon another, we now proceed, assuming him to confer any one of such estates, to consider the *time of enjoyment* ; for it is clear that it is not necessary to the creation of an estate, or to the grant of such estate to a particular individual, that the creation or grant should put the grantee in *immediate possession*. As to the time of enjoyment, estates are said to be either *in possession* or *in expectancy*. No comment is necessary as to estates *in possession*.

Estates in Expectancy.—An estate in expectancy—*i. e.*, an estate created or granted, but not to be enjoyed until some future period—is of one of three classes, and is technically termed a *reversion*, a *remainder*, or an *executory devise*.

Reversion.—The fact that every less estate is carved out of a greater, necessarily involves two consequences ; viz.—(1) that the estate out of which it is carved is, during its existence, less by that quantity ; and (2) that the moment the derivative estate ceases to exist, the estate out of which it was carved becomes again

intact¹; thus, for example, if A., who has the fee-simple in the Manor of Dale, grants it to B. for B.'s life, A. thereby denudes himself and his representatives of the enjoyment of the manor and its fruits during the life of B.; and during that period, by his own act—his grant—he has ceased to have any greater right in or to it than any other person. He still, however, retains an interest in it; for, upon the death of B., he will be in the same position as he was prior to his grant. That, his interest, is styled his *reversion*.

Remainders.—Let us put another case. Suppose that A., at the time he granted the estate to B. for B.'s life, had also granted a life estate to C., who is the son of B., and in these words, '*To B. for life, remainder to C. for life*'; it is clear that, at one and the same time—viz., at the moment of that or those grants—three estates existed in the same land, viz., A.'s estate, B.'s estate, and C.'s estate; and it is equally clear that one only of these three, viz. B.'s, is an estate *in possession*. The other two are estates *in expectancy*. Under such circumstances, B.'s estate is known as the *particular estate*, C.'s as the *remainder*, and A.'s as the *reversion*.

Vested and Contingent Remainders.—We have said that C. is the son of B.—we therefore assume him to be alive at the time of the grant by A.; but there is no reason why such a grant might not have been made to B. on the day of his marriage, the grant to C. being made at the same time, but of necessity contingent upon the fact of his being born. There is, therefore, an obvious difference between the estate granted to C., he being alive at the time of the grant, and the estate

¹ Except as we have explained in the case of estates-tail, see p. 354.

granted to him, he being yet unborn; for, should B. happen to die the day after the grant, C. would be immediately possessed of his estate, if alive, whereas, should he never be born, he could never be possessed. This difference is expressed by the terms *vested* and *contingent*.¹ The remainder is styled a *vested remainder*, when the grantee is ready and capable of taking, the moment the *particular estate* ceases. The estate is styled a *contingent remainder*, when he is not so ready and capable.

Cross Remainders.—Again, suppose A., instead of having one son only, to have two, viz. B. and C., and also to have a nephew, D., in whom he is interested. Wishing to provide equally for his sons and their children, should they or either of them have any, and at the same time mindful of D. in the possible event of their dying without issue, he might make a disposition of his estate in the following manner; viz.—
‘To B. and C. as tenants in common in tail, and in default of the issue of either of them, then to the issue of the other, as tenants in common in tail, and in default of issue of either, to D. in fee.’ These reciprocal contingencies of succession are styled *cross remainders*. Remainders are, therefore, of two kinds—viz., *vested* and *contingent*; and of contingent remainders there are two kinds—viz., contingent remainders *pure and simple*, and those contingent remainders which, in addition to the mere fact of contingency, have the further element of *double contingency*.

Executory Devises.²—Several other contingent es-

¹ See note 2.

² As to whether a devise is vested or contingent, see Boraston's case (*Tudor's L. C.* p. 713); or a bequest, *Hanson v. Graham*; *Stapleton, v.*

tates may be created, though not by the same instruments as those already mentioned. In the popular acceptation of the term, they are as much *remainders* as those already specified; but, in technical language, they are not *remainders* but *executory devises*, inasmuch as they are estates which may be and are frequently devised in or created by *wills*, but cannot be created by *deed*. It is owing to the fact of their creation being by the *last will and testament* of the testator, that they are styled *executory devises*. Before endeavouring to explain why such estates can be created by one kind of instrument and not by another, we will pursue our plan of describing the estates themselves; making, however, this preliminary observation, that, wherever a *future interest* is so limited by *devise*—i. e., in a *will*—as to fall within the rules laid down for the *limitation of 'remainders,'* such an interest is not an *executory devise*, but is a *remainder*. It therefore follows that, whereas an *executory devise* cannot be created by deed¹ or Common Law conveyance, a *remainder* may be created either by a Common Law conveyance, or by a will.

By his will, A. may devise his estate of freehold '*To his wife for life, remainder to B., his second son, in fee; provided that, should D., his nephew, within three months after the wife's death, pay the sum of £1000 to B., then the estate to go to him;*' or A. may devise his estate '*To the first son or the heir of B., when he shall have one,*' B. being at the time of the devise unmarried. Again,

Cheales (*Tudor's L. C.* pp. 724, 726). As to the effect of failure of prior gift upon executory devises, see *Jones v. Westcomb* (*Tudor's L. C.* p. 769). As to whether the gift of a sum to be raised out of real estate is vested or contingent, see *Pawlett v. Pawlett*. (*Tudor's L. C.* p. 720.)

¹ See '*Executory Interests,*' *post*, p. 401.

assuming A. to have, in addition to the freehold, a term, say for 50 years, in a farm in Kent, he may bequeath such lease '*To D., his nephew, after the death of his (A.'s) wife.*' These three instances furnish us with examples of the three kinds of *executory devises* and bequests, concerning which it should be observed that, whereas the first two relate to *freehold* estates, the last embraces all dispositions of *chattel interests* in land.

The reader may not unnaturally ask, in what does the real distinction between *remainders* and *executory devises* consist, and how is it that executory devises can be granted by one kind of instrument, and not by another. A satisfactory answer may be given to the former. It may be questioned whether the answer that must be given to the latter can be deemed equally so. In answer to the question, 'In what does the real distinction between *remainders* and *executory devises* consist?'—it may be said to be this—that, in the case of remainders, the *freehold* is never in *abeyance*, whereas, in that of executory devises, it always is *in abeyance* for some period, however short; and it is for this reason, that all limitations contained in a will, which do not place the freehold in *abeyance*, are *remainders*, and not *executory devises*; and, consequently, that it is not the instrument that makes the one or the other, though, as already stated, and hereafter to be explained, the one instrument may effect what the other cannot. The expression, '*The freehold is never in abeyance,*' may be explained in the following manner. We have said that the largest estate may be enjoyed in the smallest plot of land. In order the more fully to realise our present proposition, let us suppose and adopt a single square inch of ground, and call it X.

We say that A. has the fee simple in X. We say that his fee simple is an estate. We say that an estate is a quantity of interest. We now add in terms, that that quantity is measured by *time*, and that the *time* which it represents is a *continuing, connected, undefined period*, for it endures from the moment of the creation till its extinction, and that extinction is regulated by the fact of A.'s own existence, *plus* that of his heirs, subject only to earlier extinction by forfeiture. Let us assume that the fee simple in X. was granted in the year 1800, and that it was forfeited—by treason—in the year 1850. Its duration was 50 years. We will put two cases,—(1) A., in 1810, grants X. to B. for life, remainder to C. for life; or, (2) A., in 1810, grants X. to B. for life, and after his death, *plus* 5 years, to C. for life. In the first instance, the *continuing, connected, undefined period* is unbroken; in the second, there is a gap of five years. During that gap, the *freehold* is said to be *in abeyance*. Wherever, therefore, the *continuing, connected, undefined period* is broken, however short may be the breach, the *freehold* is said to be *in abeyance*, and no such abeyance is suffered in a *common law conveyance*—though it is in a *will*—to be, as it were, a bridge between two separate parts of an inseparable thing. When, then, it is said that '*the freehold is in abeyance*,' it is not intended that the freehold is, in fact, *in abeyance*, for that is impossible, but that, according to the terms of the grant it is made to be so. The judge, therefore, who is called upon to interpret such a deed, knowing it to be a rule of law which admits of no exception that '*the freehold cannot be in abeyance*,' can place but one interpretation upon the words '*to B. for life, and after his death, plus*

5 years, to C. for life,'—viz., that, upon the death of B., there being no remainder, the estate must revert to A., the grantor, or his heir. It is not for the judge to interpret what A. meant, but what A. said. The terms of the deed created a life estate, and conferred that life estate upon B.—they created no remainder; and therefore, upon the death of B., the legal incident *reversion* immediately attaches.

We come now to the second question,—Why should such limitations be permitted an operation forbidden them when in a deed, simply because they happen to be found in a will? The only answer that can be given is, that whereas in the case of deeds and other instruments, our Courts, speaking generally, have uniformly declined to exceed their legitimate province as interpreters of the language actually used, in the case of wills, Courts of Equity, rightly or wrongly, took upon themselves at an early date the burden of attempting to determine what testators *meant* when they used language perfectly intelligible to the Court, but which the Court was pleased to suppose was not understood by the testator who used it. Strict interpretation and construction by rule, can hardly fail at times to make what are sometimes termed *hard cases*; but it can scarcely be denied that an occasional hardship is infinitely less injurious to society in general, than the endless confusion and uncertainty inevitably attendant upon attempts to divine the intentions of others by individual sagacity rather than rule.¹

¹ The reader must not suppose that these remarks apply to the Court of Chancery of modern times, but to that of a period when it would scarcely be exceeding the truth to say that, defying alike statutes, the Common Law, and the most ordinary rules of interpretation, each judge decided each case by his whim of the moment. The Equity

Executory Interests—How Created.—An executory interest may be created, either (1) under the Statute of Uses, or (2) by will. Concerning the latter, we have, for the present, said sufficient. Executory interests created under the Statute of Uses, are styled *springing* or *shifting uses*.¹

Springing and Shifting Uses.—Should A. enfeoff B. and his heirs to the use of A.—or B., or any other person or persons—and his heirs, provided that, if a certain intended marriage should take effect, the land should thereupon be held to the use of C. and his heirs. Or should A. ‘bargain and sell’ to the use of himself and his heirs until C. should marry, and then to the use of him and his heirs. It is clear that the estate of the one is made to terminate, and that of the other to commence, upon the happening of one and the same event; or, in other words, the interests of the one are transferred to the other upon the happening of that event. This interest being the *use* of the land, it is styled a *shifting use*. Again, should the feoffment be made to A. and his heirs, to the use of C. and his heirs from Christmas next, inasmuch as the use in the meantime is not granted to any one, it cannot at Christmas next be *shifted*; it is consequently styled a *springing use*. Limitations by virtue of a power are, in effect, springing uses, dependent on the seisin created by the deed reserving the power.²

Judges of modern times, recognizing the error of such practices, uniformly decline further aggression. The result, however, of the former practice is, that we have what we may term two legal technical vocabularies, viz., the *Common Law* and the *Chancery*, to which we shall have occasion to refer, in the Institutes of English Adjective Law, where the question of the interpretation of documents will be considered in detail.

¹ See Statute of Uses, *post*, Appendix A.

² See *post*, ‘Powers.’

CHAPTER XI.

INTERESTS IN REALTY—INCORPOREAL TENEMENTS
AND RIGHTS IN ALIENO SOLO.

'INCORPOREAL tenements' or 'hereditaments' seem never to have been reduced to any regular system of division, nor is even a complete enumeration of them to be found in our books. They consist, for the most part, of *rights in alieno solo*, and are generally distributable into *profits* or *easements*. Blackstone specifies *advowsons, tithes, commons, ways, rents, annuities, franchises, offices, dignities, corodies, and pensions*.¹

If, for a moment, we suppose A. possessed of the manor represented by Plan A, bounded as described; and further suppose section 3 to be divided into nine parcels, represented respectively by *a, b, c, d, e, f, g, h, and i*, and to have running diagonally through it the stream of water *k k*, the high road *y y*, and the river *P*, emptying itself into the sea; we have before us a means of facilitating the explanation of incorporeal tenements.

Seigniorv.—By 18 Edw. I. s. 1, c. 1, A.D. 1290, from its initial words commonly called the Statute of *Quia Emptores*,² it was enacted, that 'From henceforth it shall be lawful to every freeman to sell at his own pleasure his lands or tenements, or part thereof, so nevertheless that the feoffee shall hold the same lands or tenements of the same

¹ Step. Com. i., 647 *et seq.*

² See this Statute and comments thereon, *post*, Appendix A.

chief lord of the fee, by the same services and customs as his feoffee held them before.' The object and effect of this enactment was to put an end to *sub-infeudation*. The result is, that no *manor*¹ has been created by any subject since that date. In other words, A., both before and after 1290, might sell or grant any portion of his manor, —say, for instance, parcel C,—not, however, on the same condition. Before 1290, he might have sold or granted C. upon the condition that the feoffee should hold of him, as he held of his superior lord; the consequence of which would be, that all the fruits of tenure would fall into his hands, to the prejudice of the superior lord of the fee. Since 1290, he has been debarred by the statute, not from alienating, but from alienating on the condition of feudal tenure; consequently alienation by him in fee simple, subsequent to that date, has placed the alienee in the same position relatively to the superior lord in which he himself stands in respect of that portion of his manor which he retains. As to that

¹ MANORS.—'Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little in some immaterial circumstances from those that exist at this day. It is from the Normans, however, that we derive the particular form of manors with which we are conversant at present; and among this people a manor, *manerium*, seems to have been originally a district of ground held by a lord or great personage, who kept to himself such parts of it as were necessary for his own use, which were called *terræ dominicales*, or *demesne lands*—being those of the *dominus manerii*—and distributed the rest to freehold tenants, to hold of him in perpetuity. Of the *demesne lands*, again, part was retained in the actual occupation of the lord for the purposes of his family; other portions were held in villenage; and there was, besides these, a portion which, being uncultivated, was termed the *lord's waste*, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called *baronies*, as they still are *lordships*; and each baron or lord was empowered to hold a domestic court, called the *court baron*, for redressing misdemeanours and nuisances within the manor, and for settling disputes of property among the tenants. If several of these manors were held, as was frequently the case, under one great baron or *lord paramount*, his seigniority over them was termed an *honor*. (*Blac. Com.* i. 214.)

which he alienates in fee, his entire interest has gone. He can, however, alienate *in tail, for life, or for years*. The rights which he would have acquired in respect to his alienee, in fee simple, prior to 1290, were styled his *seignior*y. Since 1290, the seigniory remains where it was; therefore no new seigniory has since then been created by a subject. But a seigniory can now be created by the Crown,¹ and, having been created, may be alienated. The giver or seller of an estate in *fee simple* is, therefore, himself but a tenant, with liberty of putting another in his own place. He may have under him a tenant *for years*, or a tenant *for life*, or even a tenant *in tail*; but he cannot now, by any conveyance, place under himself a tenant in *fee simple*.² A *seignior*y is, therefore, not the land; nor is it, properly speaking, the fruit of the land; but is a right acquired by the fact of infeudation, as against the infeudatee.

Ways.—Again, there is nothing to prevent A. from alienating parcel (*h*). Assume him to do so to X. When we look at the position of (*h*), it is evident that he cannot alienate (*h*) pure and simple, for X. cannot fly into and out of (*h*). It is equally clear that A. cannot grant X. any means of access to (*h*) through the property of his neighbours. When, then, A. alienates (*h*), though nothing may be said as to the fact, nevertheless the act of alienation carries with it the right of *access, ingress, and egress*, through some portion of the remaining land of A.; this right is styled the *right of way*, or shortly '*way*.' Assuming the *right of way*, in this instance, to be that indicated by *y y*; that right once established, it can never be withdrawn from X. or his representatives, nor can A. or his representatives release

¹ Burton, p. 320.

² Williams, R. P. p. 106.

parcels 1, 2, *b*, *e*, or 4, from that burthen, without the consent of X. or his representatives. X. has no property in either of these parcels, not even in the road he traverses, though he traverses it of right. The right that he has is attached to his land (*h*). It cannot be severed from it; for to whomsoever (*h*) may belong, to him that right also belongs; and as the right, though attached to (*h*), is not exercised in or on (*h*), it is said to be *appurtenant* to (*h*).

Common.—Again, let the shaded portion represent the *waste lands* of the manor. By the Common Law, every tenant of the manor has the right to depasture such of his cattle as are subservient to tillage and manurance—called *commonable beasts*, viz., his *horses, kine, and sheep*—upon the wastes. Such right is called *common appendant*. It will be observed that the waste land in (*g*) extends into the adjoining parcels and manor. Now, should the tenants of the adjoining manors suffer their cattle to range indiscriminately over the whole of that portion of land, the right to do so, so long as it continues, is called *common by reason of vicinage*;¹ but either lord may put an end to it by erecting a fence.² Again, assuming that, whereas A.'s manor has large tracts of waste, his neighbour has none or but little, and that A. grants his neighbour, whether for a consideration or not, the right to depasture his cattle upon his (A.'s) lands, or, by not interfering with his so doing, suffers his neighbour to acquire the right by prescription: in either case the right is *common appurtenant*.³ In some instances this right of

¹ See Sir Miles Corbet's case and Tyrringham's case. (*Tudor's L. C.* pp. 98, 101.)

² Burton, p. 351.

³ Common appurtenant often extends to other than commonable beasts, *e.g.*, to swine, goats, and geese. (*Burton*, p. 351.)

common appurtenant is granted as to a *specific number of animals*; in such case, the right appears to be capable of being severed from the land to which it was originally annexed; when so severed, the right is *common in gross*. By *prescription* there cannot be *common appurtenant* for animals *without stint or number*, though there may be by *grant*. And *common in gross* may be created with or *without number*.

Other rights of common beside that of pasture exist: for example, the *common of turbary*, i.e., the right of digging turf in another's land; the *common of piscary*, i.e., the right to fish in his waters; the *common of foldage*, i.e., the right of folding sheep on his lands; the *common of estovers*, i.e., the right of cutting wood for domestic and agricultural purposes.

Advowsons.—In parcel (2) we have placed the *manor church*. In ancient times every church appears to have been built and endowed by the lord of a manor. The lord as founder was styled the *patron*.¹ As such he had the right to select from the body of the clergy the minister of his choice, and to *present* him to the bishop, whose duty it was to institute the new incumbent. This right of *patronage* or *presentation* is styled an *advowson*. So long as the right continues to belong to the lord of the manor, it is an *advowson appendant*, but, like any other portion of his property, he may alienate it separately. If he does so, it becomes an *advowson in gross*, or *at large*; and, once having become

¹ 'An alien or papist cannot exercise the rights of a patron; for, if the former purchases an *advowson*, the Crown shall *present*; if the latter, the Universities of Cambridge and Oxford. And if a person professing the Jewish religion holds any office in the gift of the Crown to which belongs the right of presentation to any ecclesiastical benefice, such right devolves upon the Archbishop of Canterbury for the being. (*Step. Com.* iii. 716. *But see* 33 *Vic.* c. 14.)

separated, can never again become *appendant*, though it and the manor may subsequently vest in one and the same person.¹ Advowsons are also said to be either *presentative*,² or *donative*,³ or *collative*.⁴ The advowson being the right of *presentation*, and not the right of *institution*—for that right or rather duty is with the bishop—it is a logical consequence that the bishop, and not the patron, must effect the removal of the incumbent, should that become necessary. Again, as the advowson is the right of presentation, it is necessarily a right exercisable only when there is need for presentation, *i.e.*, when there is a vacancy. As an advowson is a right acquired by virtue of the outlay of money, it is reasonable that it should be alienable for money; for it is possible that the circumstances of the founder of the church may so change as to render it necessary for him to convert whatever property he may have into money. On the other hand, it is repugnant to our notions of religion that the office of clergymen should be a thing

¹ 2 Bl. Com. 22.

² A *presentative advowson appendant* is a right of patronage annexed to the possession of some corporeal inheritance. Thus, where an advowson has immemorially passed, together with a real or imputed manor, by a simple grant of such manor, without particularly referring to the advowson, it is then said to be *appendant*—*i.e.*, annexed to the demesnes of such manor, which subsist perpetually.

A *presentative advowson in gross* is a right of patronage self-subsistent, belonging to the patron as an individual, and not in any wise *appendant* to a corporeal inheritance.

³ A *donative advowson* is a spiritual preferment, not presentable, conferred by the royal letters patent upon the founder of a church or chapel, to be visited by the founder and not the bishop or ordinary. The deed of donation gives to the parson possession without any *presentation, institution, or induction*.

⁴ A *collative advowson* arises when a bishop has the right of patronage, either originally or by lapse. Collation is the conferring of a benefice by a bishop. It is an immediate institution, without any presentation, and is completed by the induction of the collatee. Where a bishop collates and dies before induction, the Crown presents as having in its custody the temporalities of the vacant bishopric. (*Wharton's Law Lexicon, and see Mirehouse on Advowsons.*)

that may be bought and sold, or that it should be in the power of any one to deprive a congregation of the services of a clergyman by refusing or omitting to *present*. Restrictions, therefore, are placed upon the patron; or, in other words, an *advowson* is, if we may so express it, a *doubly qualified* right of property. It is qualified as to the persons to whom it may be sold, and as to the time when the right of sale and presentation is exercisable.

POWER OF SALE.—The owner of an *advowson* may sell the *advowson* itself, or he may sell the *right of next presentation*, or of any number of successive presentations, to any one at any time, except to the clergyman intended to take the benefice. For, the presentation of anyone to an ecclesiastical benefice for money, gifts, or reward, is the *crime of simony*, concerning which it is enacted, by 31 Eliz. c. 6, ss. 4 & 5, 'that if any person, for any sum or reward, or promise of money or reward, shall present or collate, admit, institute, induct, or instal, any other person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years' value of the benefice or dignity, one moiety to the king and the other to any one who will sue for the same; and such presentation also shall be void, and the presentee be rendered incapable of ever enjoying the same benefice, and the Crown shall present it for that term.'¹ This statute also contains provisions against corrupt resignations and exchanges. The 13 Anne, c. 11, s. 2, declares that, if any person, for money or reward, or promise of money or reward, shall procure in

¹ 1 W. & M. c. 16 provides that, should the presentee die without being convicted of such simony in his lifetime, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of a lapse to the Crown or otherwise.

his own name, or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, that such arrangement is a *simoniacal contract*.¹

LIMIT AS TO TIME—LAPSE.—It being considered for the interest of religion and the good of the public, that the church should be regularly provided with an officiating minister, the law has lodged the right of presentation in the hands, successively, of the patron, the ordinary, the metropolitan, and the crown. This successive right is called the right to *present by lapse*. It accrues from the one to the other successively, by omission to exercise the right of presentation within six calendar months, or 182 days, from the date of its accrual to the person entitled. Thus, supposing the living to become vacant on Christmas day, the patron must present within 182 days from that date, or his right is lost. If lost, the *ordinary* may present during the next 182 days; should he omit to do so, the right of the *metropolitan* commences, and exists for the third 182 days; after which the right to present vests in the *Crown*, which is not limited as to the time of its exercise. It may happen that the bishop is both patron and ordinary; in such cases he has not two periods of 182 days; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person.

Tithes.—Tithes are the tenth part of the increase yearly arising and accruing from the profits of lands,

¹ It is simony—(1) to purchase a next presentation, the living being actually vacant (*Baker v. Rogers*, Cro. Eliz. 788); (2) for a clerk to bargain for the next presentation, the incumbent being sick and about to die (*Winchcombe v. Bp. of Winchester*, Hob. 165. See *Fox v. Bp. of Chester*, Tudor's L. C. p. 190).

the stock upon lands, and the personal industry of the inhabitants. Each class is respectively distinguished by the name *prædial*, *personal*, or *mixed*. '*Prædial tithes*' are the one-tenth part of the vegetable produce of lands. '*Personal tithes*' are the one-tenth part of the profits of a man's labour. These tithes seem to have been generally commuted for the more moderate tribute of Easter Offerings, except in fishing towns and other places, where peculiar circumstances have caused a continuance of the primitive usage. The occupier of a corn-mill may be liable to this kind of tithe; but not a common day-labourer, or any servant in husbandry, or a farmer as such. '*Mixed tithes*' are the tenth part of the animal produce. There are no tithes of *minerals*, unless by custom. By custom also, as in many ancient cities and boroughs, a tribute may be due for a house under the name of tithe. Such tithes within the City of London are ascertained by 37 Hen. VIII. c. 12, ss. 2, 11, 18; and 22 & 23 Car. II. c. 15, ss. 1, 2, 3, 10.¹

The establishment of tithes in the Christian Church is commonly ascribed to the fourth century. The first known mention of them in English law is in A.D. 786. The next authentic mention is the *Feodus Edwardi et Guthruni*, about A.D. 900.² Till the reign of Henry VIII., tithes were exclusively the property of the Church. But this monarch, having procured Acts of Parliament for the dissolution of the monasteries and the confiscation of their property, by the same Acts³ obtained a confirmation of all grants made, or to be

¹ Burton, p. 364.

² Steph. Com. ii. 723.

³ 27 Hen. VIII. c. 28; 31 Hen. VIII. c. 13; 32 Hen. VIII. c. 24.

made, by his letters patent, of any of the property of the monasteries. These grants were many of them made to laymen, and comprised the tithes which the monasteries had possessed, as well as their landed estates. Tithes thus came, for the first time, into lay hands as a new species of property. And as the tithes had been made to the grantees and their heirs, or to them and the heirs of their bodies, or for term of life or years, the tithes so granted evidently became *hereditaments*, in which estates could be held as in other hereditaments of a separate incorporeal nature.¹

The several Acts which have been passed for the commutation of tithes, affect tithes in the hands of laymen, as well as those possessed by the clergy. Under these Acts a *rent-charge*, varying with the price of corn, has now been substituted all over the kingdom for the inconvenient system of taking tithes in kind; and in these Acts provision has been made for the merger of the tithes or rent-charge in the land, by which the tithe or rent-charge may at once be made to cease,² whenever both land and tithes, or rent-charge, belong to the same person.³

Franchises, or Liberties.—A franchise or liberty is a branch of the Crown's prerogative, subsisting in the hands of a subject. Being derived from the Crown, it must arise either by a *royal grant* or *prescription* which presupposes a *grant*. The franchise or liberty may be vested in one or more persons. Thus, to be a *county palatine*⁴ is a franchise vested in a number of persons.

¹ Williams, R. P., p. 330.

² Williams, R. P., p. 331.

³ See Steph. Com. 'Public Rights—The Church,' vol. ii. p. 659 *et seq.*

⁴ COUNTY PALATINE (from *palatium*, Lat., a court).—There were three of these counties—Chester, Durham, and Lancaster. The two former

It is likewise a franchise for a number of persons to be *incorporated*, and subsist as a body politic, with power to maintain perpetual succession, and do other corporate acts; or for one or more to have a *fair*,¹ *market*, *ferry*, or the like, with the right of taking *tolls* there, or to have *forest*, *chase*, *park*, *warren*, or *fishing*, the

were such by immemorial custom, the latter was created by Edward III. The Bishop of Durham and the Duke of Lancaster had royal power within their respective counties. They could pardon treasons, murders, and felonies; they appointed judges and magistrates; all writs and indictments ran in their names, and offences were said to be done against *their* peace, and not *contra pacem domini regis*. The 11 Geo. IV. and 1 Wm. IV. c. 70, abolished the Court of Session of the county palatine of Chester, and subjected the county in all things to the jurisdiction of the superior courts at Westminster. The 4 & 5 Wm. IV. c. 62; 13 & 14 Vic. c. 43; 15 & 16 Vic. c. 76, s. 229; 17 & 18 Vic. c. 82, and c. 125, ss. 100—102; 18 & 19 Vic. c. 15, ss. 1—3, c. 45, and c. 67, s. 8; 21 & 22 Vic. c. 27, s. 10, regulated and made conformable the practice and proceedings in the Court of Common Pleas and of Chancery at Lancaster, in most particulars, to those of the superior courts; and the 2 Vic. c. 16; 15 & 16 Vic. c. 76, ss. 229—234; 17 & 18 Vic. c. 125, ss. 100—104; 18 & 19 Vic. c. 15, and c. 67, s. 8, have made similar provisions with regard to the courts at Durham.

The counties palatine are now in the hands of the Crown; the jurisdiction of Durham is vested, as a separate franchise and royalty, in the Crown, by 6 & 7 Wm. IV. c. 19. Lancaster was vested in the Crown by Henry IV., separated indeed from the other possessions of the Crown in order and government, but united in point of inheritance. (*Wharton's Law Lexicon*.)

¹ A man may have a right to hold a *fair* or *market*, or to keep a boat for the *ferrying* of passengers, though he be not the owner of the soil in which the fair or market is held, or of the water over which the right to ferry is exercised, or of the soil on either side of the river; he must, however, possess such rights over the soil—such rights, at least, as will authorize him to embark and disembark his passengers. The right to take toll is usually a part of the privilege. The tolls of a fair or market are due either in respect of goods sold there—*i.e.*, from the seller, not the buyer—or for stallage or pickage or the like, in respect of stalls or poles fixed in the soil. The right of the Crown to authorize the collection of tolls is, however, viewed by the law with jealousy, and no burthen of that kind can be imposed upon the public, unless, in the language of the books, it has a reasonable commencement—*i.e.*, unless it be founded on an adequate consideration as between the public and the grantee, *e.g.*, providing the grounds, regulating the proceedings, or keeping up a boat. The tolls also, to be legal, must be reasonable. (*Steph. Com.* i. 663, and see *Burton*, p. 327.)

right to *deodands*, *treasure-trove*, *waifs*, *strays*, or *wreck*; to hold a *Court Leet*, or view of *Frank Pledge*.¹

Rents. — *Rent-seck* — *Rent-charge* — *Annuities*. — A 'rent' (*reditus*) is, properly, a sum of money or other thing, to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is to the grantor or person demising. A rent, therefore, necessarily supposes a reception of such lands or tenements from another, to whom they primarily belonged, and in whom the ultimate property continues vested. Consequently, if a person grants his whole property in certain premises to another on the condition that the grantee shall pay to the grantor and his heirs a fixed sum annually for ever, such annual sum is not properly a *rent*, the grantor having no ultimate property or reversion. It is called a *rent-charge*, or a *rent-seck*; but, not being a rent proper, the Common Law denied to the grantor or his representatives the power of *distress*, which it gives in the case of *rent proper*. The 4 Geo. II. c. 28, s. 5, has, however, granted the remedy by *distress*, in the same manner as for *rent reserved upon lease*. The name, accordingly, is no longer appropriate to this right.

A 'rent-charge' or 'annuity' is a grant of an annual sum of money payable out of the fruits of certain lands of the grantor. If the grantor is *seised in fee-simple*, he can make a grant of a rent charge either for *a term*, *for life*, *in tail*, or *in fee*; but, if he is not seised in fee, he cannot, of course, create a charge for a greater estate than his own.

A rent-charge or annuity must be created by *deed*

¹ See Steph. Com. i. 125.

or will. By 18 & 19 Vic. c. 15, ss. 12 & 14, it is enacted that 'An annuity or rent-charge granted after the 26th of April, 1855, otherwise than by marriage settlement, for a life or lives, or for any estate determinable on a life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, until the particulars mentioned in the Act are registered in the Court of Common Pleas, where they are entered in alphabetical order by the name of the person whose estate is intended to be affected. A search for annuities is, accordingly, made in this registry on every purchase of lands, in addition to the Searches for Judgments, Crown debts, and *lis pendens*.¹ See 33 & 34 Vic. c. 35, entitled 'An Act for the better Apportionment of Rents and other Periodical Payments.'²

Rights in alieno solo.—Rights *in alieno solo* are commonly divided into two classes, viz., *profits à prendre* and *easements*.

Profits à prendre.—A '*profit à prendre*' is a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil. A *profit à prendre* differs from an *easement* in that, in the case of a *profit à prendre*, there is a participation in the profits of the soil, whereas in the case of the *easement* there is not. Thus a right of *pasture*, or of *digging sand*, or of *killing and taking away the game or fish*,—but not of taking or using water,³—is a *profit à prendre*; but the right to receive *light* or *water* passing across or through a neighbour's land, must be claimed as an *ease-*

¹ Williams, R. P., p. 316.

² As to the better apportionment of rents, see *Clun's case*, Tudor's L. C. p. 233.

³ See *Manning v. Wasdale*, 5 Ad. & E. 758.

ment, because the property in them remains common.¹ Water as it issues from a well or spring is not considered as produce of the soil, so as to make the right to take it *in alieno solo* for domestic purposes a *profit à prendre*. Such a right is an *easement* only, and may be claimed by custom.²

Easements.³—An easement is defined to be ‘*a privilege without profit, which the owner of one neighbouring tenement has of another, existing in respect of their several tenements, by which the SERVIENT OWNER is obliged to suffer, or not to do, something on his own land for the advantage of the DOMINANT OWNER.*’ The essential qualities of easements are thus distinguished:—(1) They are *incorporeal*. (2) They are imposed upon *corporeal property*. (3) They confer no right to a participation in the profits arising from such *corporeal property*. (4) There must be two distinct tenements—the *dominant*, to which the rights belong; and the *servient*, upon which the obligation is imposed.⁴ The principle of law upon which the whole doctrine of easements rests is, that ‘*no man shall derogate from his own grant.*’

The existence of an easement, therefore, *assumes* a grant, and a grant assumes that the grantor granted not merely the thing itself, whatever it might be, but that also without which his grant would be worthless, *Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest.*

Therefore, if I have a house with certain lights in it, and land adjoining, and I sell the house, but keep the

¹ Gale on Easements, p. 8.

² *Race v. Ward*, 4 E. & B. 702.

³ See *Sury v. Pigot*, Tudor's L. C. p. 127.

⁴ Gale on Easements, p. 5.

land; neither I, nor anyone claiming under or through me, can obstruct any of the lights by building on the land; for, by selling the house, I sell the easement in the lights also.¹

In the Civil Law, easements are divided into two classes—viz., *affirmative*² and *negative*.³ ‘Those coming under the head of *affirmative easements*, authorise the commission of acts which, in their very inception, are positively injurious to another—as ‘*a right of way across a neighbour’s land*,’ or a ‘*right to discharge water*,’—every exercise of such rights may be the subject of an action. *Negative easements* are injuries consequentially only—i. e., restricting the owner of the soil in the exercise of the natural rights of property—as where he is prevented from building on his own land, to the obstruction of the lights of another. With respect to this latter class, it is evident that no cause

¹ *Palmer v. Fletcher*, 1 Lev. 122.

² The English law furnishes the following, amongst other instances, of affirmative easements:—Rights of way; right to make surface uneven by working mines in such manner as to let it down (*Rowbotham v. Wilson*, 8 H. of L. 362); rights to go on soil of another to clear a mill stream and repair its banks (*Lord Campbell in Beeston v. Weate*, 5 E. & B. 996); rights to go on a neighbour’s close, and draw water from a spring there (*Race v. Ward*, 4 E. & B. 702); right to conduct water across a neighbour’s land by an artificial water-course, and to go upon that land for the purpose of turning the water into the same (*Beeston v. Weate*); right to discharge water or other matter on to a neighbour’s land; right to discharge rain-water by a spout on projecting eaves; right to use or to affect water of natural stream in any manner not justified by natural rights; right to support from a neighbouring wall; right to carry on an offensive trade; right to hang clothes on lines passing over the neighbouring soil (*Drewell v. Towler*, 3 B. & Ad. 735); right to make and spoil banks upon surface in course of working minerals (see *Rogers v. Taylor*, 1 H. & N. 706); right to bury in a particular vault; right to a pew in church.

³ The principal negative easements are:—Acquired rights to receive light and air by windows; acquired right to support of neighbouring soil. The right to receive a flow of water of a natural stream is not an easement, but an ordinary right of property. (*Gale, Eas.* 21.)

of action can arise from their exercise; they can be opposed only by an obstruction of their enjoyment.¹

We will particularize the rights to *light, water, support, and ways*.

Lights.—We have already observed, that the seller of a house with lights may not afterwards obstruct such lights, and that his successors and representatives deriving title, either immediately or mediately, from him, are under the like obligation. It is only necessary to add, how the like right is acquired by *prescription*.

By 2 & 3 Will. IV. c. 71, s. 3, it is enacted, that ‘When the access and use of light, to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of *twenty years* without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.’

Water.—The right to have a stream run in its natural course, is not by *grant*, or *presumed grant*, but *ex jure nature*.² The diverter, however, of the stream from its natural course, may acquire a right to such diversion by *prescription* in *twenty years*.³ In order to maintain a right to water by *prescription*, it is not necessary to show that the precise mode of enjoyment has been always the same.⁴ As to how the riparian

¹ Gale, *Ease*. 19.

² *Dickinson v. G. Junction Canal*, 7 Exc. 299.

³ *Mason v. Hill*, 3 B. & Ad. 304.

⁴ *Saunders v. Newman*, 1 B. & A. 258.

proprietor may use the water as it passes, see the Judgment in *Embrey v. Owen*.¹

As to prescription, the law of watercourses is generally the same, whether *natural* or *artificial*.² But the right to the enjoyment of an *underground spring* is not governed by the same rule of law as that which applies to regulate a *watercourse flowing on the surface*.³ Therefore the owner of a mill on the bank of a river, having no right *jure nature* to the water of the stream, cannot maintain an action against a landowner who, by sinking a well on his own land, diverts the underground water which otherwise would have got to the river.⁴

Support.—Support is of two kinds—viz., *lateral* and *perpendicular*; for example, adjoining fields or houses support each other *laterally*, substrata support the surface land, and under floors or chambers support upper floors or chambers *perpendicularly*. In either case, these may be separate tenements, held by different individuals. We have to enquire the rights of the tenant of the surface land, or of the upper floor or chambers, to support, and those of the owner of land or a house contiguous to that of another.

As to the substrata.—Where the surface of land, and the minerals under it, are held as separate tenements by different owners, the owner of the surface is entitled to support from the subjacent strata.⁵ And if a man grants land, reserving the mines below it, and also the power of entering upon the sur-

¹ 6 Exch. 353.

² *Magor v. Chadwick*, 3 P. & D. 367. See, however, *Arkwright v. Gell*, 5 M. & W. 203.

³ *Acton v. Blundell*, 12 M. & W. 324.

⁴ *Chasemore v. Richards*, 7 H. of L. 349; and see Wm. S. ii. 805.

⁵ *Humphries v. Borden*, 12 Q. B. 739; Wm. S. i. 559; ii. 803, 804.

face of the land in order to do such acts as may be necessary for the purpose of getting the mines, he is liable for damage occasioned to the surface by working the mines to such an extent, as not to leave a sufficient support for it, in the state it was at the time of the grant.¹

As to underfloors, &c.—If the owner of a house grants an upper room, with the reservation of the lower, he is liable on his covenant if he removes the support of the upper room, for the law will not permit him to defeat his own act by taking away the support from the upper room.²

As to lateral support.—The right that a man has to the support of the land immediately around his house, is not in the nature of an *easement*, but is the ordinary right of enjoyment of property;³ the same may be said as to the right of adjacent landowners to the lateral support of land.⁴ But if I have laid an additional weight on my land by building, my neighbour is not to be deprived of his right of digging his own ground, merely because mine will then become incapable of supporting the artificial weight which I have laid upon it; unless indeed, from the lapse of time since the building was erected, or otherwise, the right to support has been acquired under Lord Tenterden's Act, or a grant can be inferred.⁵ Each of the adjoining owners having the undoubted right, until lost or suspended, to dig his land up to the very edge of his

¹ *Harris v. Ryding*, 5 M. & W. 60.

² *Per Park B.* in 5 M. & W. 71.

³ *Backhouse v. Bonomi*, 9 H. of L. 503.

⁴ *Humphries v. Brogden*, 12 Q. B. 742.

⁵ 2 & 3 Wm. IV. c. 71; *Wyatt v. Harrison*, 3 B. & Ad. 871.

neighbour's land, and at the same time each being bound by the maxim, *Sic utere tuo ut alienum non lædas*, it is not difficult to see that questions of considerable difficulty arise, when these two principles are in real or apparent conflict in a particular case.

Ways.—Rights of way are *easements*; but, being also incorporeal tenements, have been placed and considered under that head.¹

¹ See *ante*, p. 404.

CHAPTER XII.

INTERESTS IN PERSONALTY.

IN treating of interests in *personalty*, as distinguished from interests in *realty*, as the subject of a separate Chapter, my main object is to direct attention to Table XII. Without some such Table, the Tabular Analysis would be conspicuously imperfect, there being a Table entitled 'Interests in Realty.' On the other hand, the titles that this Table necessarily contains must, *ex necessitate rei*, have for the most part appeared in the general Tables, 'Things' (Table VI.), and 'Dominium' (Table VIII.)

To attempt to exhaust the subject of interests in *personalty* in one chapter, would be altogether inconsistent with the general scheme of the work. Such being the case, my observations will be confined to a few general remarks upon the contents of Table XII.

Sovereign Interests in Personalty.—Though I can in no place find in our books upon Private Law any such expression as '*sovereign interest in personalty*,'—and indeed the expression '*sovereign interest in realty*' may be said to be singularly conspicuous by its absence from such books,—yet, nevertheless, in works on International Law, we find the principle clearly recognised and expounded under the title of *Eminent Domain*; and I venture to think that, when treating of property, whether *real* or *personal*, as there is an unquestionable sovereign interest in it, that such sovereign interest

should always be regarded as the foundation or starting-point of enquiry, when attempting to determine and indicate the interests of the subject.¹

By so doing, our attention is immediately attracted to one fundamental distinction between real and personal property—viz., that whereas the primary or original ownership, in the case of realty, is necessarily in the sovereignty, the primary or original ownership, in the case of personalty, is equally of necessity in the subject; for the thing itself, that is the subject of personal property rights, may be said to be brought into existence by the subject, which bringing of the thing into existence gives to him the *natural* rights of absolute dominium. He, however, being a subject, and as such being in the main debarred the exercise of *natural* rights—*e.g.*, of *physical* defence in respect of his property—that defence being undertaken by the sovereignty; the cost of such defence gives to the State a species of lien or charge upon it. This charge is levied by the sovereignty of this country, directly or indirectly, under the title of *rates* and *taxes*.

We appear, therefore, justified in saying that the term '*absolute dominium*,' or '*absolute property*,' when used in reference to *personalty*, must, as in the case of realty, be understood to be '*absolute dominium*, subject to sovereign claims'; which, being a contradiction in terms, is obviously an objectionable formula of the idea intended—viz., that what is to be understood by the expression '*absolute dominium*,' or '*absolute property*,' when applied to a subject, signifies '*the largest proprietary rights that can be enjoyed by a subject in any given thing.*'

¹ See Inst. P. L., Eminent Domain, p. 260.

Concerning *qualified* or *special* property, we have already had occasion to speak in general terms. The circumstances under which, and the extent to which, property in personalty is qualified, constitute in effect the burden of our remaining remarks upon the law relating to things.

Upon the *quantity* and *origin* of interests in personalty, nothing need be added to what has been said under the same titles concerning realty.

In reference to the word '*tenants*,' as used in Table XII., it is not necessary to do more than say that the primary object of thus using it was to maintain uniformity and points of comparison between Tables IX. and XII. It is not usual to apply that term to the proprietors or possessors of personalty. There is, in fact, no term, so far as I know, referable to *personalty*, that corresponds to the term *tenant* as used in respect of *realty*.

The other titles and subjects mentioned in Table XII., will be found in the Index, with the necessary references.

See 29 Vic. c. 2, entitled 'An Act to amend the law relating to Contagious or Infectious Diseases in Cattle and other Animals'; 29 & 30 Vic. c. 110, entitled 'An Act to amend the Cattle Diseases Prevention Act'; 30 & 31 Vic. c. 125, entitled 'An Act to continue and amend the Acts relating to Contagious or Infectious Diseases among Cattle and other Animals'; 32 & 33 Vic. c. 70, entitled 'An Act to consolidate, amend, and make perpetual, the Acts for preventing the introduction or spreading of Contagious or Infectious Diseases among Cattle and other Animals in Great Britain.'

CHAPTER XIII.

ALIENATION EX CONTRACTU ABSOLUTE.

Gift.—A gift is the voluntary and gratuitous transfer, that is, the transfer without valuable consideration,¹ of the property in a given thing, from one person to another. By the law of England, in order to transfer property by gift there must be either a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.²

Exchange—Barter.—The term '*exchange*' is always employed when the subject of transmutation is realty; when it is personalty, the terms '*barter*' and '*exchange*' are used indiscriminately. An exchange of realty is a mutual grant of equal interests, the one in consideration of the other.³

By 8 & 9 Vic. c. 106, s. 3, every exchange of any tenements or hereditaments, not being copyhold, must be by deed; and, by s. 4, an exchange is declared not to imply any covenant⁴ in law.

¹ See '*Consideration—Valuable*,' *post*.

² Abbot, C.J., in *Irons v. Smallpiece*, 2 B. & A. 552.

³ Watkins on Conveyancing, p. 314.

⁴ Prior to this Act, the law annexed to exchanges an implied warranty and an implied condition: a *warranty of title*, which compelled the former owner, in the event of an action brought against the present owner, either to defend his right or to restore his original land; a *condition*, by which either party to the exchange or his heir, if lawfully deprived by a third person (though without action) of the land received by that party in exchange, might enter upon and resume the land given in exchange, and enjoy it as if no exchange had been made. (*Burton*, p. 16.)

In an exchange of realty, the estates exchanged must be equal in quality—*i.e.*, both *fees simple*, both *fees tail*, or both *estates for life*. The word 'exchange' must be used. Each party must make an entry on his new property.

A barter, or exchange of personalty, is the transmutation of property from one man to another, for a consideration not given in money, but in some other sort of commodity.

Sale.—Sale is the transmutation of property from one to another for a *pecuniary* consideration, styled the *price*. With respect to the contract of sale, the law appears to recognise five different classes of property; viz.—(1) Realty; (2) Movable corporeal property, excluding the property in ships; (3) Property in ships; (4) The property in intangible things, such as railway stock, shares, &c.; and (5) The property in the materials on which contracts or documents of title are written.

Sale of Realty.—In addition to what has already and necessarily been said elsewhere respecting the sale of realty, I propose, in this place, to direct the reader's attention to the important statutes of the present reign; viz., the 19 & 20 Vic. c. 120 (1856), entitled 'An Act to facilitate Leases and the Sales of Settled Estates;' the 37 & 38 Vic. c. 33 (1874), entitled 'An Act to extend the powers of the Leases and Sales of Settled Estates Act'; and the 37 & 38 Vic. c. 78 (1874), entitled 'An Act to amend the law of Vendor and Purchaser, and further to simplify Title to Land.' By 37 & 38 Vic. c. 78, it is provided:—

Sec. 1. 'In the completion of any contract made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, *forty*

years shall be substituted as the period of commencement of title which a purchaser may require in place of *sixty years*, the present period of such commencement; nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.¹

Sec. 2. 'In the completion of any such contract as

¹ TITLE—A PURCHASER.—The title to land is either by purchase, meaning thereby the act or agreement of the parties; or by mere act of law, as by descent or escheat. But the different modes of acquiring real property have usually been distributed into *two* general classes—title by descent, or hereditary succession, and title by purchase. Purchase, therefore, in this its widest technical sense, is the acquisition of an estate in any other manner than by descent. Hence, if a person takes even by *free gift*, he is a purchaser in this technical sense of the word. So a person is called a purchaser in reference to an estate tail, which he takes originally under a limitation contained in a settlement made before he was born, and not derivatively by descent from his ancestor. Sometimes, however, the word *purchase* signifies an acquisition for valuable consideration. At other times, it signifies an acquisition by act of the party, as opposed to an acquisition by act of law. In this sense it does not include such a mode of acquisition as *escheat*. (*Smith's R. & P.* p. 462.)

In every case where the statement in the abstract of title, or its silence, leads to a fair inference that the prior title may disclose an existing defect, the purchaser may require it to be produced; although, where it is not in the seller's power, he cannot object to the title on mere suspicion. (*Sugd. Concise View*, p. 266.) There being no reasonable ground for doubt or suspicion as to the anterior title, the result of the prior instrument, though referred to or recited in the abstracted deeds, is not material (1 *Byth. and Jarm. by Sweet*, p. 62). Where an assurance depends for its validity upon something which had been previously done, the whole transaction should appear upon the abstract, although the abstract may thereby be carried far beyond the statutory period—*e.g.*, the *power* and the requisites to its valid exercise must precede the appointment under it, or the marriage articles the post-nuptial settlement (1 *Byth. and Jarm.*, p. 67). In the case of an advowson, 100 years' title at least is necessary. (*Sugd. Concise View*, p. 267; *Smith's R. & P.* p. 561 *et seq.*)

RULE IN SHELLEY'S CASE.—Where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, or to the heirs of his body, the word '*heirs*' is a word of limitation and not of purchase; so that the ancestor takes the whole estate comprised in the term—that is to say, in the first case an estate in *fee simple*, in the second an estate in *fee tail*. See Tudor's L. C. p. 507; and see *post*, the word '*purchaser*,' how used, in 3 & 4 Will. IV. c. 106.

aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules ; that is to say—(i.) Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold. (ii.) Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions. (iii.) The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents. (iv.) Such covenants for production as the purchaser can and shall require, shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser. (v.) Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents.'

Sec. 3. 'Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act. . . .'

Sec. 9. 'A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in

a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract) ; and the judge shall make such order upon the application, as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.'

By 19 & 20 Vic. c. 120, it is provided (sec. 11), that 'It shall be lawful for the Court of Chancery, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the Settlement,¹ and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates ; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of Court.²

By s. 12, it is enacted, that the consideration for land

¹ 'The word "settlement," as used in this Act, shall signify any Act of Parliament, deed, agreement, copy of Court Roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure, or any estates or interest in any such hereditaments, stand limited to or in trust for any persons, by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively ; and the term "settled estates," as used in this Act, shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement ; and, for the purposes of this Act, a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life.' (sec. 1.)

² As to the repeated exercise of these powers in respect of the same estate, see sec. 26. As to the limit of the powers of the Court, see sec. 27.)

sold for building may be a *fee farm rent*; by s. 13, that minerals, &c., may be excepted from the sale; by s. 14, that dedications of parts of the lands may be made for roads, &c. Secs. 15 *et seq.*, as amended by 37 & 38 Vic. c. 33, direct the manner in which sales and dedications are to be effected, and indicate the persons entitled to make application to the Court for these purposes, the consents and notices requisite. By s. 23, the Court is empowered to appoint trustees to receive and apply the monies arising from such sales.

Sale¹—Goods and Chattels Personal.—Sale, we have already said, is a ‘transmutation of property from one to another for a pecuniary² consideration styled the *price*.’ A contract concerning the sale of goods has been defined to be ‘a mutual agreement between the owner of goods and another, that the property in the goods shall, for some price or consideration, be transferred to the other, at such a time, and in such a manner, as is then agreed.’³ Every such contract is either ‘*executory*,’ or ‘*executed*.’ When executed, it is technically termed ‘*a bargain and sale*.’ When goods are bargained and sold, though not-delivered, the general property in them has passed to the purchaser; the vendor, however, if unpaid, has, under certain cases, what is termed the ‘right of *stoppage in transitu*.’⁴

By the Common Law, the property in any *specific chattel* belonging to Class II.—Moveable corporeal

¹ As to sales by auction, see 30 & 31 Vic. c. 48.

² In the case of goods.—If the consideration to be given for the goods is not money, it might, perhaps, in popular language, rather be called barter than sale, but the legal effect is the same in both cases. (*Blackburn's Contract of Sale*, p. 3.)

³ *Blackburn's Contract of Sale*, p. 3.

⁴ See ‘*Stoppage in transitu*,’ *post*.

property, excluding the property in ships—the price of which is below £10, passes by the mere mutual assent of the vendor and purchaser, coupled with a consideration; and the contract will be enforced, upon the production of any evidence sufficient to satisfy the Court of the fact of the mutual assent and consideration. If, as we have already seen, the contract is by deed, the consideration is presumed, and no evidence is necessary to prove the consideration, or admissible to disprove it. In the case of a contract for the sale of goods, wares, or merchandise belonging to the same class (No. 2) for the price of £10 or upwards, it is enacted, by 29 Car. II. c. 3, s. 17 (1677), that ‘No contract for the sale of any goods, wares, and merchandises for the price of £10 or upwards,¹ shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold, and actually receive the same, or (2) give something in earnest to bind the bargain, or in part payment, or (3) that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized;’² and by 9 Geo.

¹ The following agreements have been held to be within 29 Car. II. c. 3, s. 17, and 9 Geo. IV. c. 14, s. 7:—Sales by auction (*Kenworthy v. Schofield*, 2 B. & C. 945); an agreement for the sale of timber then growing, and to be cut by the vendor (*Smith v. Surman*, 9 B. & C. 570); for the sale of potatoes not yet at maturity, at so much per sack, to be dug by the purchaser (*Sanisbury v. Matthews*, 4 M. & W. 343); for the sale of all the potatoes then growing on certain lands at so much an acre (*Warwick v. Bruce*, 2 M. v. S. 205). But contracts which fall under the description ‘work and labour and materials provided,’ though they result in the delivery of completed goods, are not within the sec. (*Clay v. Yates*, 25 L. J. Ex. 237; *Lucas v. Godwin*, 3 Bing. N. C. 737.)

² The agent contemplated by the legislature, who is to bind a party by his signature, must be some third party, and not the other contracting party on the record. (*Abbot, C.J., in Farebrother v. Simmons*, 5 B. & A. 335.)

IV. c. 14, s. 7, it is enacted that 'The provision of the Statute of Frauds shall extend to all contracts for the sale of goods to the value of £10 or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.'

We now proceed to consider in their order the three different modes pointed out by the Statute of Frauds, by compliance with either of which the agreement of sale becomes a binding contract.

1. THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME.

In this instance, *receipt* and *acceptance* must concur. The word '*received*' being used in its popular and ordinary sense, would need no comment, were it not that the delivery of goods frequently necessitates the instrumentality of a third person, and thus imports the doctrines of *agency*.

The word '*accept*' is used to express the fact of *approval* or *satisfaction*; and as the word '*accept*' is in the statute placed before the word '*receive*,' it is not unreasonable to say, that this provision had in contemplation that class of cases where the purchaser first inspects, selects, and approves the particular goods, and having thus completed the act peculiar to himself, the agreement as to price being common to the two, leaves the vendor to the discharge of his particular act—viz., the delivery to the purchaser of those goods so selected and approved. As, however, in many instances receipt *precedes* acceptance, or the possibility

of it, as when the owner sends goods for the express purpose of inducing *acceptance* as the result of inspection, both classes of cases are held to be within the provision.

An Acceptance.—The question of *acceptance* or not, is a question of *intention*. When this intention, in the absence of a declaration of acceptance, has to be adjudicated upon by others, the judgment is necessarily based upon the acts of the person, and is therefore, in all cases, matter of opinion. As a matter of law, an acceptance is held to take place '*as soon as, in virtue of the bargain, the buyer becomes entitled to retain, and retains accordingly.*'¹

Receipt.—'Upon a sale of specific goods, for a specific price,' by parting with the *possession*, the seller parts with his *lien*. The statute contemplates such a parting with the possession, and therefore, so long as the seller preserves his control over the goods, so as to retain his *lien*, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.²

Actual Removal.—There can be no question that an actual removal of the goods by the purchaser is an actual *receipt* by him; and when the goods are in the hands of a *third party*, it is pretty clear that, as soon as the vendor, the purchaser, and the bailee agree together that the bailee shall cease to hold the goods for the vendor, and shall hold them for the purchaser, that is an actual receipt by the purchaser, though the goods themselves remain untouched. They were in the possession of an agent for the vendor, and so, in contemplation of law, in that of the vendor himself; and they

¹ *Hinde v. Whitehouse*, 7 East, 570. *Phillips v. Bistolli*, 2 B. & C. 511.

² *Holroyd, J.*, in *Baldev v. Parker*, 2 B. & C. 37.

become in the possession of an agent for the purchaser, and so in that of the purchaser himself; and it can make no difference whether this is by a change in the person of the holder of the goods, or merely in his *character*.¹

Change of Custody.—Acceptance and actual receipt do not necessitate, or necessarily imply, a *change of custody*, for the property in goods sold, not merely can, but mostly does, pass while they are in the actual possession of the vendor. Obvious, however, as is this proposition, the evidence of acceptance, and actual receipt of goods sold, but left in the custody of the vendor, is not unfrequently perplexing.²

2. The meaning of the second exception—viz., ‘EXCEPT THE BUYER SHALL GIVE SOMETHING IN EARNEST TO BIND THE BARGAIN, OR IN PART PAYMENT’—is too obvious to need comment.

3. The third exception—‘EXCEPT THAT SOME NOTE OR MEMORANDUM IN WRITING OF THE SAID BARGAIN BE MADE AND SIGNED BY THE PARTIES TO BE CHARGED BY SUCH CONTRACT, OR THEIR AGENTS THEREUNTO LAWFULLY AUTHORIZED’—induces three inquiries; viz.—(1) What is a sufficient memorandum? (2) What is a sufficient signature? and (3) Who is an agent lawfully authorized to sign? The Statute of Frauds in no way interferes with the Common Law rules of evidence applicable to written testimony.³

¹ Blackburn, *Sale*, p. 28.

² The following acts have been held sufficient:—A re-sale of the goods or part thereof by the purchaser (*Chaplin v. Rogers*, 1 East, 192); The marking of the casks in the presence of all parties (*Anderson v. Scott*, 1 Camp. 235); The writing by the purchaser of his name upon the goods (*Hodgson v. Le Bret*, 1 Camp. 233; but see *Balday v. Parker*, 2 B. & C. 37); Assent on the part of the vendor to take charge of the goods (horses) as *liveryman* for the purchaser (*Elmore v. Stone*, 1 Taunt. 458; but see *Tempest v. Fitzgerald*, 3 B. & A. 680; *Carter v. Toussaint*, 5 B. & A. 856).

³ See Blackburn, p. 43 *et seq.*

The express object of the Statute of Frauds being to remove the most fertile source of contention and litigation—reliance upon mere memory—there can be no doubt that, to comply with the spirit of the Act, and to avoid the evils it was intended to avert, the memorandum should be a perfect memorandum; that is to say, it should contain the date, the names of the parties, a clear description of the subject of the contract, the consideration, and be signed by both parties. The ignorance or carelessness of business men on the one hand, the requirements of the statute on the other, and the desire of our judges at the same time to comply with the statute and to observe, it is to be presumed, the legal maxim, *Ut res magis valeat quam pereat*, has led the Bench to accept as sufficient various forms of memoranda that were certainly not perfect, and which, therefore, though tolerated, are not to be considered as being encouraged.¹

Agreements, whether executed or merely executory—Rules as to construction of.—‘The law professes to carry into effect the *intention* of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement, and not before.’²

¹ The memorandum has been held sufficient—(a) when no price was mentioned, because ‘when the parties are silent as to price, they leave it to the law to ascertain what the commodity is reasonably worth.’ (*Tindal, C.J., in Hoadly v. McLaine*, 10 Bing. 487.) (b) When signed by one party only, the contract may be enforced against, but not by him. (*Allen v. Bennet*, 3 Taunt. 169.) (c) When in part upon one, and in part upon another or other pieces of paper, provided they so refer to each other as to show that they are parts of one and the same thing, and that together they make a whole. (*Boydell v. Drummond*, 11 East, 142.) (d) The signature may be in print, and, whether in print or not, in any part of the memorandum, provided there are indications of the name being appropriated to the recognition of the memorandum. (*Schneider v. Morris*, 2 M. & S. 286.) As to who is agent, see *ante*, p. 430, note 2; ‘Principal and Agent,’ p. 126 *et seq.*

² Blackburn, p. 129.

In order to effect this purpose, the Courts have adopted the following rules of construction :—

1. The parties are not held to have contemplated a bargain and sale, unless the specific goods are agreed upon, for till then the property cannot have passed, the goods themselves not being ascertained.¹

The selection of the goods by the one party, and the adoption of that act by the other, converts that which was before a mere agreement to sell, into an actual sale, and the property thereby passes.² Whether there was or was not an adoption, is a question of *fact*. Whether the selection by the one merely showed an intention in that party to appropriate those particular goods to the contract, or whether it determined the right of election, is a question of *law*.

2. In the case of an *executory agreement* to sell unspecified goods, the act—*e. g.*, the selection by the vendor—that is in law an appropriation, or, in other words, that passes the property, takes place, when the vendor, with the authority of the vendee, does the final act in performance of his part of the agreement; for example, when, by the agreement, the vendor is to dispatch the goods, or to do something to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement; and, in Lord Coke's language, '*the certainty, and thereby the property, begins by election.*'³

¹ Heyward's Case, 2 Coke, 36; *White v. Wilks*, 5 Taunt. 176; but see *Whitehouse v. Frost*, 12 East, 614.

² *Holroyd, J.*, in *Rohde v. Thwaites*, 6 B. & C. 388.

³ Heyward's Case, 2 Coke, 36; *Blackb.*, p. 128; see *Fragano v. Long*, 4 B. & C. 219; *Atkinson v. Bell*, 8 B. & C. 277.

3. When the specific goods are agreed upon, the law presumes that the parties intended the property to pass immediately upon the making of the contract. It is therefore held to have so passed when the agreement does not express a contrary intention,¹ or when, by the nature of the transaction, the passing of the property and the payment for the same are intended to be simultaneous, as in the case of purchases in a retail shop.²

4. When, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them—into a deliverable state—the performance of those things shall, in the absence of agreement or circumstances indicating a contrary intention, be taken to be a *condition precedent* to the vesting of the property.³

5. Where anything remains to be done to the goods for the purpose of ascertaining the price—as by *weighing, measuring, or testing* the goods, and the price is to depend on the *quantity or quality* of the goods—the performance of those things shall be taken to be a *condition precedent* to the transfer of the property, although the individual goods are ascertained, and are in the state in which they ought to be accepted.⁴

The unpaid vendor's right of stoppage in transitu.—We have seen that the property in specific goods sold, passes from the vendor to the purchaser the moment

¹ *Simmons v. Swift*, 5 B. & C. 862.

² *Bussey v. Barnett*, 9 M. & W. 312.

³ See *Blackburn*, cases cited, pp. 151 *et seq.*

⁴ See *Blackburn*, p. 152.

the contract of sale is completed, and that though the goods continue to remain in the custody of the vendor. We have seen that the effect of this transfer of the property is to convert the vendor from *owner* into a *mere bailee* of the goods. We may add that, without express bargain to the contrary, he is a mere *gratuitous bailee* with whom the goods of the purchaser lie at the purchaser's risk, and from whom the purchaser—or, in the event of his bankruptcy, his assignees—in the case of the vendor refusing to deliver, may obtain them by action of *trover*.¹ We have seen that when, by *actual fraud*, one induces another to sell—perhaps, more correctly, *to do that which, in the absence of fraud, would be a sale*—the property does not pass. We now come to the consideration of a totally different case—one that cannot be explained upon, or reconciled with, the principle of the former: the case where the law at the same time holds the property to have passed, yet gives to the unpaid vendor the right to repossess himself, provided he can succeed in doing so within the limits assigned to him by the law, in which case he defeats the right both of the vendee and his assignee. This right of the unpaid vendor is styled '*the right of stoppage in transitu*.' The limits of this right may be stated thus:—

1. The right of *stoppage in transitu*² belongs exclusively to a vendor,³ unpaid either in whole or in part.⁴

¹ But see *ante*, p. 272.

² The right of '*stoppage in transitu*,' must not be confounded with the right of '*lien*' on goods for work done on or to them. (See '*Lien*,' and see *Sweet v. Pym*, *Freeman v. Birch*, *Blackb.* 211.)

³ *Feise v. Wray*, 3 East, 93; *Siffken v. Wray*, 6 East, 371; *Tucker v. Humphrey*, 4 Bing. 516.

⁴ The circumstance of the vendee having partially paid for the goods, does not defeat the vendor's right (*Hodgson v. Loy*, 7 T. R. 440); nor that the goods were sold on credit, which credit had not expired at the

2. It arises only in the event of the vendee *failing* or becoming *insolvent* before delivery.¹

3. It only exists while the goods are *in transitu*, that is, between the time of their leaving the possession of the vendor and coming into the possession, *actual* or *constructive*, of the vendee, or his representative.²

time of the stoppage (*Inglis v. Usherwood*, 1 East, 515; *Bohtlingk v. Inglis*, 3 East, 381), even though the vendor may have received and negotiated the vendee's bills for the full amount (*Feize v. Wray*; *Patten v. Thompson*, 5 M. & S. 350; but see *Davis v. Reynolds*, 4 Camp. 267; and comment thereon, *Blackburn*, p. 218). Payment to the vendor's agent is payment to the vendor, though the agent embezzles the money. (*Bunney v. Poyntz*, 4 B. & Ad. 568.) See '*Principal and Agent*.'

¹ The mercantile law is clear and distinct, that the vendor has not a right to vary the consignment, except in case of insolvency. (*Blackb.* p. 266.) 'There is no necessity that the vendee should have been formally declared a bankrupt.' 'The text-books and *dicta* of the judges do not restrict the use of the term "insolvent," or "failed in his circumstances," to one who has stopped payment.' However, as the carrier obeys the *stoppage in transitu* at his peril, he should demand evidence of insolvency before refusing to deliver to the consignee. (See *Blackb.* p. 266.)

² Goods in the hands of a public carrier, either by land or by water, and actually on the journey, are clearly *in transitu*. It is equally clear that goods travelling on the same journey in the vendor or vendee's own cart or vessel, are *not in transitu*. The difficulty, when any, exists in determining the real character of the person having *pro tempore* the custody of the goods. Is he servant of vendor, servant of vendee, or a middle man? If servant of vendor, the goods are *not in transitu*, because they have not left the vendor; if servant of the vendee, the goods are already delivered. What, then, is the law? (1) In the case of goods delivered by the vendor on board a vessel chartered by the vendee.—This depends upon the nature of the charter-party. A *charter-party* is an agreement, either that (i.) The owner, remaining master of the captain and crew, lets the ship with their services to the charterer; or that (ii.) The owner makes the charterer *pro tempore* master of the captain, crew, and ship. In the former case—the most frequent—the master is held to be a *carrier*, in whose hands goods may be stopped (*Bohtlingk v. Inglis*, 3 East, 381); in the latter, delivery to him is delivery to the vendee, and the goods cannot be stopped in his hands (*Fowler v. MacTaggart*, cited 7 T. R. 442). (2) Whether the goods are in actual motion or not, is immaterial. The *transitus* commences with the delivery by the vendor to another, as agent to forward. Therefore the question to determine is, whether the person so possessed by

4. It must be exercised by claiming or taking the goods, as by *right paramount* to that of the purchaser.¹

5. It ceases to exist, or is destroyed, upon assignment of the bill of lading for value *bonâ fide* given for the goods.²

the vendor, is an agent *forward* or an agent *hold* for the buyer. And here it must be observed that the person in possession may have different characters; for example, he may at the same time be *carrier* and *warehouseman*. As *warehouseman* he may have the goods in his warehouse, either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the vendee. The question of fact may be difficult to determine, but the law appears simple, and to be that, when it is the intention both of the vendee and the holder that the latter shall retain, subject to the directions of the former, the *transitus* is at an end, for the goods are in the constructive possession of the vendee. (See *James v. Griffin*, 2 M. & W. 623; *Lackington v. Atherton*, 8 Scott, N. S. 38; *Jackson v. Nichol*, 5 Bing. N. C. 508.) The mere fact of taking samples out of the bulk is not taking possession of it, though it may be some evidence of that fact. (*Dixon v. Yates*, 5 B. & Ad. 313.)

If the vendee meets the goods upon the road and lawfully takes them into his own possession, that is an arrival sufficient to destroy the right of stoppage. (*Chambers, J., in Oppenheim v. Russel*, 3 B. & P. 54; *Mills v. Ball*, 2 B. & P. 457.) A mere demand by the vendee is not a getting of the possession. (*Jackson v. Nichol*, 5 Bing. N. C. 508.)

¹ Even if the vendor's agent takes actual possession of the goods, it is not a *stoppage* unless taken with that intent. (See *Siffken v. Wray*, 6 East, 371.) The consent or even instigation of the vendee does not render the taking the less a stoppage. (*Mills v. Ball*, 2 B. & P. 457.) Notice by the vendor to the person in possession, of his claim to stop, if given when it can be obeyed, is a sufficient stopping. (*Litt v. Cowley*, 7 Taunt. 169.) So likewise, when given under similar circumstances to a master, whose servant is in possession. (*Whitehead v. Anderson*, 9 M. & W. 518.)

² This is the only way in which the vendor's right can be defeated by the purchaser, before he or his representative takes possession of the goods.

As, when A. sells X. (goods) to B., the property in X. passes to B. without delivery, it is obvious that, before delivery to himself, B. may sell X. to C.; it is equally clear that, by so doing, he confers no greater right to X. upon C. than he himself had; therefore, as he possessed X. subject to A.'s rights as vendor, C. must possess it subject to the same. We have seen that the insolvency of B. before delivery, X. *not being in transitu*, vests X. in B.'s assignees, whereas, X. *being in transitu*, the insolvency divests the assignees, and gives to A. the right of stoppage *in transitu*; that is, that B.'s rights—including his assignees'—to the possession of X. became defeasible by his insolvency. To this general principle there is, however, an exception,

Del credere commission.—‘When,’ says Mr. Addison,¹ ‘the agent, in consideration of an additional commission, guarantees to his principal the payment of all debts that become due through his agency to his principal, he is said to act under a *Del credere commission*, a phrase derived from the Italian word *credere*, to trust.’² Every person accepting and acting under a commission of this sort for the sale of goods, makes himself responsible for the solvency of his vendees, and becomes absolutely liable to his principal for the payment of the price of the goods he sells.³ Factors and commission agents for sale, who receive and sell goods for foreign principals, or for parties residing at a distance, usually conduct their agency under a *Del credere commission*, guaranteeing the solvency of the buyers, or undertaking for the due payment of the price realised on sales effected by them. This contract, however, is not a contract or promise to answer for the debt or default of another within the meaning of the Statute of Frauds, but an original, independent contract, and only another form of *selling goods*.⁴

Shipping.—The Merchant Shipping Act, the 17 & 18 Vic. c. 104, may be regarded as the code by which this branch of the law is mainly regulated. To give

as where the property in X. has been transferred *bond fide* by the endorsing of the bill of lading for a valuable consideration, and without notice to the assignee that the goods were not paid for, or that they were paid for by bills sure to be dishonoured. In such case, though the consignee named in the bill of lading should become insolvent without having paid for the goods, the consignor is deprived of his right of stoppage *in transitu*, for otherwise an innocent party would be damnified. (See *Bill of Lading*, *Smith's Mercantile Law*, 300; *Blackb.* 270.)

¹ ‘Contracts,’ p. 701.

² *Grove v. Dubois*, 1 T. R. 112.

³ *Mackenzie v. Scott*, 6 Bro. P. C. 280.

⁴ *Conturier v. Hastie*, 8 Exch. 40.

even an imperfect notion of its contents would demand more space than the nature of our scheme would warrant. Our attention is, therefore, confined to the consideration of four points—(1) What ships are, properly speaking, British? (2) Has a British ship any privileges, and, if so, what? (3) How are proprietary rights in British ships acquired and transmitted? and (4) What are the rights of part-owners?

British Ships.—No ship is deemed British unless—I. She belongs wholly to owners of one or more of three classes; viz.—(i.) Natural-born British subjects;¹ (ii.) Persons made denizens by letters of denization, or persons naturalized;² and (iii.) British bodies incorporated by and subject to the laws of the United Kingdom or a British possession.³ II. Or unless she is registered as a British ship at some British port.⁴ From this general rule must be excepted—(i.) Ships, not exceeding fifteen tons burden, employed solely on the rivers or coasts of the United Kingdom, or of some British possession within which their managing owners reside; and (ii.) Ships not exceeding thirty tons burden, and not having a whole or fixed deck, employed solely in fishing or trading coastwise on the shores of Newfoundland or parts adjacent, or in the Gulf of St. Lawrence, or on

¹ But a British-born subject, who has taken the oath of allegiance to any foreign sovereign or state, is disqualified to be an owner, unless he has subsequently taken the oath of allegiance to her Majesty, and is, and continues to be, during the whole period of his being an owner, resident within her dominions; or, if not so resident, a member of a British factory, or partner in a firm carrying on business within them.

² Note (1) is to be taken as repeated, as far as applicable.

³ Smith's Mercantile Law, p. 173.

⁴ When the property in the ship is transferred, the ship being abroad, to British owners, the British consular officer of the port may grant her a provisional certificate, which will have the same force for six months, or until her earlier return to a port where is a British registrar, as a certificate of registration. (17 & 18 Vic. c. 104, s. 54.)

such portions of the coasts of Canada, Nova Scotia, or New Brunswick as lie bordering on such Gulf. (s. 19.)

No ship is absolutely required to be registered. Without registration, however, she is not entitled to the privileges of a British ship. (s. 19.)

In order to obtain registry, the name of the ship (s. 34), which must not be afterwards changed, and the port to which she belongs, must be painted on her stern on a dark ground in white or yellow letters not less than four inches long; and a declaration (s. 38) must be made and subscribed by every owner, setting forth the name, port, and description of the ship, the name and residence of the owner, with the facts necessary to prove him a subject of her Majesty, qualified to own a share in a British ship, together with what may be briefly designated as a description and history of the ship. (s. 38.)

The above requisites being complied with, the ship is registered, and a certificate of registry delivered to the applicant. Upon the back of this certificate any change in the master of the vessel is required to be endorsed and signed by the proper officer. (See s. 46.) Alterations in the ship—depending upon their character and extent—may necessitate registration *de novo*.

A British ship ceases to be considered as such, and her certificate of registry must be delivered up, if she is actually or constructively lost, taken by the enemy, burnt or broken up, or if she becomes the property of persons not entitled to be registered. (s. 53.)

The privileges.—The right to assume the national flag and character, and the protection those afford, are the only, but by no means insignificant, privileges which attach to a British ship.

The unwarranted assumption of these privileges in some instances entails forfeiture; *e.g.*, the use of the British flag and the assumption of the national character on board a ship owned wholly or in part by persons not entitled by law to own British ships, in which case certain of her Majesty's officers are empowered to seize and bring the vessel for adjudication before a Court of Admiralty, when it will be condemned, unless excused on the ground of its conduct being adopted as a means of escaping capture by an enemy or foreign ship of war under a belligerent right. (s. 103.)

So, if any unqualified person—except in the case of interest transmitted otherwise than by transfer—acquires as owner any interest, whether legal or beneficial, in a ship using the British flag, and assuming the British character, such interest becomes forfeited, and the vessel liable to seizure. (s. 103.)

Title, how acquired.—Original title to a ship is necessarily acquirable in but one way, *viz.*, by building it. A ship is a chattel personal. Derivative title may be acquired either by—(1) Capture, followed by condemnation;¹ (2) Purchase; (3) By the operation of the bankrupt laws; (4) Abandonment to the insurers;² (5) As a marital right, consequent upon marriage; (6) By being taken in execution under a judgment; or (7)

¹ This mode of acquisition is ranked by Mr. Smith as original; for, as he says, 'Although such capture and condemnation suppose a pre-existing right in some one to the vessel captured, yet this is enumerated as a mode whereby property in it may be originally acquired, because we are, as must be recollected, treating only of British shipping; and its right to be registered, and consequently to be called British, does not accrue till sentence of condemnation.' He, however, adds in a note, 'This rather had reference to the old state of the law, which did not allow foreign-built ships ever to be registered except in case of condemnation.' (*Mercantile Law*, p. 180.)

² See 'Marine Insurance,' 'Abandonment,' *ante*, 228.

By devolution from the prior testate or intestate owner. Our attention may be confined to acquisition by *capture plus condemnation*, and *purchase*; the latter calling for some remarks upon the authority to sell.

Acquisition by Capture and Condemnation.—In addition to what has been said upon this subject in the Institutes of English Public Law,¹ we may add, in the words of Mr. Smith, that ‘Respecting the Court in which the sentence of condemnation is passed, there is the following rule—viz., That a legal sentence of condemnation cannot, according to the law of nations—which regulates all cases of prize—be passed by the Consul or Minister of the belligerent power, in the country of a neutral power, to which the prize has been taken. But states in alliance with the captors, and at war with the country to which the prize belongs, are considered as forming one community with the captors; and a prize carried into such a state may be condemned, either there by a Consul belonging to the nation of the captors, or in the country of the captors.’²

Sale and Purchase of Ships.—‘The Master,’ said Baron Parke,³ ‘has not merely those powers that are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to *dispose of her for their benefit*.’ But there must be the clearest proof of *necessity*; it must be shown, not only that the vessel was in want of repairs, but likewise that

¹ See p. 317 *et seq.*

² Mercantile Law, p. 180, where see authorities.

³ *Hunter v. Parker*, 7 M. & W. 342.

it was impossible to procure the money for that purpose.¹

The property in every British ship is considered in law as divided into 64 equal parts or shares. No person can be registered as owner of any fractional part of a share; but any number of persons, not exceeding five, may be registered as joint-owners of a share or shares, who, being considered as one person, cannot dispose in severalty of their individual interest. Not more than thirty-two individuals can be registered at the same time as owners of any one ship (s. 37). These rules do not affect the equitable or beneficial title of any number of persons, or any company represented by, or claiming through, any registered owner or owners. No notice, however, of any trust can be entered on the register, or received by the registrar.²

Every transfer of a registered ship to a person qualified to be the owner of a British ship, must be by *bill of sale under seal*, drawn, executed, and attested in the prescribed form.³ The transferee, in order to be registered, must make the declaration prescribed.⁴

Part-owner's rights.—If the several owners have not themselves precluded all dispute by agreeing in the choice of a ship's husband, or managing owner, and delegating the care of their interests to him, the Court of Admiralty⁵ will interfere, by arresting the ship, and preventing the majority of owners from sending her abroad against the will of the minority, without first entering into a stipulation, in a sum equal in value to the shares of the dissentients, either to bring back the

¹ The *Fanny and Elmira*, Edw. Adm. Rep. 118.

² Secs. 43, 66; and see 25 & 26 Vic. c. 63, s. 3; also authorities quoted by Mr. Smith, p. 183.

³ Sec. 55, and Sched. E.

⁴ Sec. 56, Scheds. F., G.

⁵ See 24 & 25 Vic. c. 10.

ship, or pay the value of their shares. On giving this security, they are permitted to send the ship to sea. If the minority are in possession of the ship, the majority may take it out of their hands by a warrant of the Court. But the dissentient owners bear no part of the expense, and are entitled to no part of the profits of the voyage to which they have disagreed. When the owners are equally divided in opinion, either half may apply to the Court to interfere in the manner above stated.¹

Where the ship is under the management of the master, and the owners divide the profits, the master is, with respect to her concerns, *prima facie* agent for them all. Co-owners of a ship are, however, not *partners*. Any one may transfer his share without the consent of the other. Nor can the share of one be confiscated for the acts of another done without his privity. The *admission* of one does not bind the other.

Mortgage of Ships.—A mortgage of a British ship, or any share in her, must be in a specified form, *under seal and attested*, which, as in the case of a transfer, states the number and date of the registry, and the other particulars of the ship.² The effect of the mortgage is to give the mortgagee, as against the mortgagor, the right to the immediate possession of the ship, and thereupon to her earnings, whensoever they accrue. If, therefore, the mortgagee takes possession of the ship, or does an act equivalent to it, as he may during a voyage, he is entitled to receive the freight earned in that voyage.³

The mortgagee is preferred to the assignees of the

¹ *Mercantile Law*, p. 190.

² Sec. 66, Sched. 1.

³ See cases, *Smith*, pp. 187, 188.

mortgagor, in case of bankruptcy, and is protected from having the mortgaged property considered as in the bankrupt's *order and disposition*.¹

See 30 & 31 Vic. c. 124, entitled 'An Act to amend the Merchant Shipping Act, 1854'; 30 Vic. c. 15, entitled 'An Act for the abolition of certain Exemptions from Local Dues on Shipping, and on goods carried in Ships'; 33 & 34 Vic. c. 95, entitled 'An Act to authorise the carriage of Naval and Military Stores in Passenger Ships'; 33 & 34 Vic. c. 50, entitled 'An Act to amend the Shipping Dues' Exemption Act, 1867'; 34 & 35 Vic. c. 101, entitled 'An Act to amend the law respecting the proving and sale of Chain Cables and Anchors'; 35 & 36 Vic. c. 30, entitled 'An Act to suspend the compulsory operation of the Chain Cables and Anchors Act, 1871'; 34 & 35 Vic. c. 110, entitled 'An Act to amend the Merchant Shipping Acts'; 35 & 36 Vic. c. 73, entitled 'An Act to amend the Merchant Shipping Acts, and the Passenger Acts'; 36 & 37 Vic. c. 85, entitled 'An Act to amend the Merchant Shipping Acts'; 37 & 38 Vic. c. 51, entitled 'An Act to amend the laws respecting the proving and sale of Chain Cables and Anchors'; 37 & 38 Vic. c. 52, entitled 'An Act to make regulations for preventing Collisions in the Sea Channels leading to the River Mersey.'

¹ *BOTTOMRY* is a species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged (*partem pro toto*) as a security for the repayment of a sum of money. If the ship be totally lost, the lender loses his money, but if she returns safely, he recovers his principal, together with the interest agreed upon. Such bonds are allowed as valid in all trading nations, for the benefit of commerce, and as a *pretium periculi* for the extraordinary hazard run.

RESPONDENTIA occurs when the money is borrowed, not upon the vessel, as in bottomry, but upon the goods and merchandise contained in it, which must necessarily be sold or exchanged in the course of the voyage, in which case the borrower personally is bound to answer the contract.—*Wharton*.

CHAPTER XIV.

ALIENATION EX CONTRACTU QUALIFIED.—

CONDITIONAL ESTATES IN REALTY.

FROM what has already appeared, it is evident that every estate or interest in land is both granted and held upon *conditions*. In addition, however, to the conditions with which we are already familiar, there may be others upon which the *vesting* or *divesting* of an estate or interest may depend ; such conditions are either *expressed* or *implied*, and are either *precedent* or *subsequent*. They are either expressed or implied and precedent, or expressed or implied and subsequent. When they are conditions *precedent*, whether expressed or implied, the vesting of the estate or interest depends upon their having been fulfilled or complied with. When they are conditions *subsequent*, whether expressed or implied, the termination of the estate or interest—*i.e.*, the divesting of its possession—is contingent upon their performance. A. may add to the term of his grant (*e.g.*, ‘to B. for life’) the words ‘on condition that, &c.,’ or some equivalent expression ; in which case the estate, though created, will not vest—*i.e.*, will not become B.’s—till the happening of the event or the performance of the condition mentioned, called the *condition precedent*. Again, he may grant the estate ‘to B. till, *e.g.*, the return of X. from Paris. In which case the estate is, equally with the other, *conditional* ;

but as the condition, in this instance, is not to *vest* but to *determine* the estate, it is called a *condition subsequent*. As for conditions precedent, it is unnecessary to do more than refer the reader to what has already been said concerning them elsewhere.¹ As most important and well-known examples of conditions subsequent, we may specify *mortgages*, (*statutes merchant*, and *staple*, now obsolete,) and *estates by elegit*.

Mortgage.²—Pledges of land are of three kinds³; viz., *Mortuum vadium*, *Vivum vadium*, and *Welch mort-*

¹ See Index, 'Conditions Precedent.'

² 'A mortgage,' says Mr. Coote, 'may be defined to be a *debt by specialty*, secured by a *pledge of lands*, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches.' (*Coote's Law of Mortgage*, p. 1.)

³ In the case of *pawn*—i.e., the *pledge of personalty*—the possession of, but not the *property* in, the thing pawned is passed by the pawnor to the pawnee; whereas, in the case of *mortgage*—i.e., the *pledge of realty*,—the *property passes*, subject to revesting, but not the *possession*, and consequently not the fruits, till obtained on condition broken. Hence, I should assume that the term *mortgage*, *mortuum vadium* (*dead pledge*)—even without the support of the assumption derived from the fact that the term *vivum vadium* is actually employed to express a pledge which gives to the pledgee the fruits as well as the naked property—indicated the pledge of a fruit bearing subject without the right to such fruits. See and compare *Vivum vadium* and so-called *Welch mortgages*. Mr. Coote says, 'A considerable obstacle to mortgages arose and long continued from the prejudice of the times; for, in analogy to the Jewish law (*Deut. xxiii.*) which forbade profit to be made on the loan of money from Jew to Jew, but not so on a loan from a Jew to a stranger, it was held to be *usury* for Christians to lend money at interest (3 *Inst.* 88); and (in case on death after inquest, it was found that a man had died an usurer), the offence was punishable by forfeiture of his lands, goods, and chattels. It was not until the 37 Hen. VIII. c. 9, that loans of money at interest were declared legal. By this Act the interest could not exceed \$10 per cent. The consequence was, that the Jews became the great money-lenders of Europe; and, in compliance with the subsisting prejudice, the Common Law of England held that, if lands were enfeoffed to the creditor, and the rents and profits were, *ad interim*, received by him, and not applied in reduction of the principal of his debt, it was a species of usury which, although not prohibited by the king's court, was punishable by the forfeiture of the lands and chattels of the creditor, if he died possessed of the pledge; and this, according to Glanville (died 1190) (*De Leg.* lib. 10, cc. 6, 8) was the original meaning of the term *mortuum*

gage. The first, *Mortuum vadium*, being that in general use, is that which is understood by the term *mortgage*. Suppose, then, an agreement to be entered into between A., who has the fee simple in X., and B., who has agreed to lend him £500 upon the security of his lands, in these words :—

‘ Now this Indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of £500 now paid to the said A. by the said B., the receipt whereof the said A. doth hereby acknowledge, . . . the said A. doth hereby grant unto

vaaium, or *mortgage*, and not the meaning subsequently attached to the word by Littleton and others.’ (*Cooté*, p. 3.) According to Littleton, it is called *mortgage* or *mortuum vadium*, ‘ for that it standeth in doubt whether the feoffor—*mortgagor*—can pay at the day limited such sum or not: and if he doth not pay, then the land which he puts in pledge upon condition for the payment of the money, is gone from him for ever, and is *dead* to him upon condition, &c.; and if he doth pay the money, then the pledge is *dead* as to the tenant,’ &c. (*Littleton*, s. 332.)

Vivum vadium, or living pledge, of but rare occurrence, is when one (e.g., A.) borrows a sum (e.g., £500) of B., granting him as security an estate (e.g. of £50 per annum) to hold till the rents and profits shall repay the sum borrowed. The pledge, the land, is said to be living, because, so soon as the sum borrowed is repaid, which of necessity must at some time take place—and in the case of our example, there being no interest, in ten years—the estate reverts unfettered to the borrower. (*See Stephen's Com.* i. 304.)

Welsh mortgage is the conveyance of an estate, upon condition that the rents and profits thereof shall, subject to account in Chancery, be taken in satisfaction of the *interest* payable upon the sum borrowed, and that the borrower shall be at liberty, at any time, to redeem his estate by repayment of the principal. It differs from *Vivum vadium* in that the profits do not go in reduction of the debt. ‘ This,’ says Mr. Burton, ‘ is evidently no other than a *purchase* with a right of *repurchase reserved*; by which no debt is created on the one side, and therefore the responsibility of a depositary is not incurred on the other. A more usual kind of Welsh mortgage is where the conveyance is made subject to a condition for defeating the estate, as soon as the principal and interest shall be satisfied out of the rents and profits of the land; this has been compared to a *tenancy by elegit*; but it seems to differ no otherwise from the ordinary case of a mortgagee in possession than, as the land is the only security for the debt, and the mortgagor has no right to redeem by tender of the money before the period of satisfaction, measured by the annual value of the land, has expired. (*Burton*, 459.) As this estate cannot become forfeited at law by breach of the condition, there cannot be a foreclosure. (*Howell v. Price*, *Proc. Chanc.* 423.)

'the said B., his heirs and assigns, All, &c. (X.), To have
'and to hold the hereditaments and premises hereby granted
'or expressed so to be, unto and to the use of the said B., his
'heirs and assigns, for ever, subject to the proviso for redemption hereinafter contained: Provided always, and it is hereby
'agreed and declared, that if the said A., his heirs, executors,
'administrators, or assigns, shall on the 1st day of March next
'pay to the said B., his executors, administrators or assigns,
'the sum of £500, with interest for the same after the rate of
'£5 per cent. per annum, computed from the date of these presents, then and in such case the said B., his heirs or assigns,
'shall upon the request and at the cost of the said A., his
'heirs or assigns, reconvey the hereditaments and premises
'hereby granted, or expressed so to be, unto and to the use
'of the said A., his heirs and assigns, or as he or they shall
'direct; and in the meantime, and until the said 1st day of
'March next, the said A., his heirs and assigns, shall remain
'in the possession or receipt of the rents and profits of the
'said hereditaments and premises, &c."¹

We have to inquire the effect of this agreement, called a *mortgage*; and, as it is regarded in a different light by our Courts of Common Law from that in which it is regarded by our Courts of Equity, to ascertain the construction put upon it by each.

COMMON LAW CONSTRUCTION.—Though called a *mortgage* or *dead pledge*, whatever may be the real origin and meaning of the expression,² our Courts of Common Law look to what the parties to the agreement have said, and not to what they may have intended. They therefore hold that, when the agreement says that the property in the land passed when it is said to have passed—*i. e.*, at the date of the agreement—that it did

¹ Here follow other covenants; *e.g.*, by mortgagor to pay principal and interest; for right to convey; for quiet enjoyment (which operates as a re-demise—*Wilkinson v. Hall*, 3 Bing. N. C. 508); power of sale (which see *post*, p. 459), &c. See Frideaux's 'Precedents in Conveyancing,' Vol. i. p. 440.

² See p. 449, n. 3.

so, and that it is to be reconveyed upon one condition only—viz., on condition of the repayment of the money advanced, upon the day fixed for such repayment.

They further hold, it being expressly stipulated that the right to possession shall be contingent upon failure of payment on the day mentioned, that such failure gives to the mortgagee that right. In other words, our Courts of Common Law assume that the parties were capable of contracting, and that they knew and meant what they said. They therefore put the only construction that can be put upon the agreement with such assumptions. The fundamental maxim as to the right to contract being *Modus et conventio vincunt legem*.¹

EQUITY CONSTRUCTION.—About the time of James I. (1603—1625) some learned Judge, certainly not Lord Coke, possibly thinking the particular instance before him what some people would call a hard case, and doubtless anxious to satisfy his own pet notions of justice, which we may assume to have been largely flavoured with a due horror of usury, happened to stumble on the fact, that somewhere the money that

¹ Nor does it appear that the wisdom of such construction was ever questioned till about the reign of James I. (1603—1625). We have no report or note of the first case upon the point. We have, however, evidence of the fact, that late in the reign of Elizabeth (1558—1603), the Common Law doctrine was in full force, and we know that the Chancery doctrine was treated as established by the Court of Chancery, in the first year of Car. I. (1625—1649. See *Emanuel College v. Beane*, 1 Rep. in Chancery, 10.) In 1611, King James created the Order of Baronets, which dignity he sold to all who were willing to buy it. The price was £1095. In six years he sold about a hundred patents, and pocketed the £109,500 or thereabouts. Possibly, mortgage was pretty freely resorted to in order to raise the necessary £1095, which, in those days, was a good round sum, and not likely to be met with on loan, except amongst the merchants. I offer this merely as a suggestion. It is a fact that *baronetries* and *equity of redemption* date from the same reign. It is also a fact that no reign produced more corrupt judges.

passed was spoken of as being a loan; when he reasoned¹—at least, so one would suppose—somewhat after the following fashion, ‘Once a priest, a priest for ever,’—well, then, ‘Once a loan, a loan for ever.’ In vain might the counsel for the mortgagee argue, that it is the undoubted privilege of the citizen to enter into what contracts he thinks fit, they not being unlawful; that this particular kind of contract was of such ancient date that its origin could not be traced; that it could not be contended there had been any fraud on the part of the mortgagor, or that the mortgagor was a lunatic, or an infant; that the mortgagee did not know his rights, or was prevented from repaying the principal on the day he himself had stipulated; that it would be gross injustice to the mortgagee to deprive him both of his capital and of his land; that in good faith he had entered into the agreement, relying upon its being held sacred, and upon his having either the one or the other at the date agreed upon; and that the result of depriving him of both, was practically to ruin him. His Lordship had read the ‘Little Thief,’² and having hatched his grand idea, ‘Once a loan, a loan for ever,’ was resolved to teach the world how to undo ‘Algripé.’ He therefore solemnly decided that the agreement did not mean what it said, and that the mortgagor should not forfeit his land, though he had broken his agreement by not repaying the money at the stipulated time. ‘It is true,’ we can imagine him saying, ‘that Courts of Law

¹ See the arguments in *Bates’ and Hampden’s Cases*, Inst. P. L. pp. 152, 165.

² *Alathe*.—‘Thou hast undone a faithful gentleman, by taking forfeit of his land.’

Algripé.—‘I do confess. I will henceforth practise repentance. I will restore all mortgages, foreswear abominable usury.’

hold that, by not repaying at the date fixed, the mortgagor has, in fact, sold his land for the £500, and therefore the property is in the mortgagee, and consequently all the proprietary rights, which I cannot debar the mortgagee from exercising; but, as this Court acts *in personam*, I will compel you to re-convey the property to the mortgagor the moment he is in a position, and thinks fit, to repay you principal, interest, and, we may say, costs. This right that I give to him, I call his *equity of redemption*, and to this right he shall continue entitled till I think fit to *foreclose* it. In the meantime, let the mortgagee go, and be content with his interest.' This doctrine, which I have ventured in this manner to lay before the reader, it need hardly be said, was strenuously opposed by the Common Law Judges. Once enunciated, however, it was warmly cherished by the then Court of Chancery, and by that Court and its admirers has been spoken of in the most flattering terms. It is true that—as everybody now knows, or is supposed to know, that a mortgage deed does not mean what it says—no one is now likely to suffer hardship in the name of equity. It is no less true that, notwithstanding all that has been said in favour of this interference with the *right of contract*, that Equity Judges of succeeding ages have felt themselves bound to restrain, as far as has been in their power, mischief they could not uproot, for it is now a rule that Judges are bound by precedent. No further observation on the unsoundness of the theory, 'Once a mortgage, a mortgage for ever,' is needed, than to say that it has been held by the Court of Chancery, that a default in payment of a half-year's interest on the appointed day, is a sufficient breach of

condition to entitle the mortgagee to foreclose.¹ Having thus attempted to show how it came to pass that a mortgage means one thing at Common Law, and another in Equity, and to explain what is intended by the terms *equity of redemption*, and *right to foreclose*, it will be convenient to dispose of these two subjects before considering the rights of the mortgagor and mortgagee, irrespective of them.

Equity of Redemption.—The rule being ‘Once a mortgage, always a mortgage,’ the only thing necessary to establish the right to redeem, is to satisfy the Court that the transaction was, in fact, a *mortgage*—i. e., a *pledge*, and not a *sale*²—for if the land was, in fact, conveyed by way of *collateral security for the repayment of money lent*, whatever clause or covenant there may be in the conveyance, the Court will hold the transaction to be a mortgage, and, being a mortgage, declares it impossible to make it *not redeemable*.³ Nor will the Court permit the parties to restrict the right of redemption to a given or limited term.⁴ Accordingly, Equity will admit even parol evidence to show that the conveyance was intended by way of security only.⁵

¹ See *Coote*, 497, and *Stanhope v. Manners*, 2 Eden, 197; *Gladwyn v. Hitchman*, 2 Vern. 135; *Taylor v. Waters*, 1 Myl. & Cr. 266. But see ‘Foreclosure,’ p. 456.

² In the case of *Barrell v. Sabini* (1 Vern. 268), the Lord Keeper said he was satisfied it was not originally a mortgage, but an absolute purchase; and he thought, where there was a clause or proviso for repurchase, the time limited ought to be precisely observed. An important consequence results from the distinction between a *mortgage*, and a *purchase with a proviso for repurchase*—viz., that in the latter case, if the party to whom the conveyance is first made dies seised, after which the option is declared by the other party to take the estate, the purchase-money may belong to the *heir*, and not to the *executor*, as would be the case had it been a mortgage. (*See Cases, Coote*, p. 21.)

³ See 5 Bac. Ab. Mortgage, B.

⁴ *Newcomb v. Bonham*, 1 Vern. 7.

⁵ *Sir G. Maxwell v. Lady Montacute*, Prec. Chanc. 526.

The *equity of redemption* is held by the Court of Chancery to be not a mere right to a Bill in Equity, but to be an *estate in the land*; and as such is, of course, subject to all the limitations to which other *equitable estates* are liable. It may itself become the subject of mortgage. Its devolution is the same as the land itself. It is an *equitable asset*. The person entitled to it is regarded as the real owner of the land, the mortgagee being virtually considered his *trustee*, the mortgage *personal assets*.¹ The equity of redemption, as in the case of a mere trust, is not binding on a *bond fide* purchaser, without notice, for valuable consideration. 'There is not, however, any *trust*, in the fullest sense of the word, subsisting between a mortgagor and the mortgagee, until payment or tender of the money; except that the mortgagee, if in possession or in receipt of the rents, is accountable for all his surplus profits.'²

Foreclosure.—'Equity,' says Mr. Coote,³ 'having determined that the mortgaged debt shall be considered the *principal*, and the land a *pledge*,—and, as a consequence, that the mortgagor, notwithstanding his breach of condition and the consequent forfeiture at law of his estate, shall be relievable in equity, on payment of principal, interest, and costs; and the mortgagee in possession accountable for the rents and profits,—it became, on the other hand, just that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff; but that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose *his equity*, or, in other words, *be*

¹ *Casborne v. Scarfe*, 1 Atk. 602.

² *Burton*, 449.

³ *Mortgage*, p. 492.

foreclosed his right of redemption The forbearance of equity on behalf of the mortgagor seems to be carried to its utmost limits, even so far as, in some instances, to work a serious detriment to the mortgagee.¹

The usual course pursued on foreclosure is, for the mortgagee to file his Bill, praying that an account may be taken of principal and interest, and that the defendant may be decreed to pay the same with costs by a short day, to be appointed by the Court, and in default thereof he may be *foreclosed his equity of redemption*. On the answer coming in, the matter is referred to one of the Masters, to take the account, and a decree is made for payment of principal, interest, and costs, within *six calendar months* after the Master's report of what is due on that account, or, in default, the mortgagor shall stand *foreclosed*. After the amount has been taken, the Master makes his report, and appoints a day for payment; the report is confirmed, and, on default made, the mortgagee may obtain an absolute order for *foreclosing*. The order is afterwards signed and enrolled, and the foreclosure is complete.² The term for payment may—the circumstances war-

¹ By 3 & 4 Will. IV. c. 27, s. 28, it is enacted that, Where the mortgagee has obtained possession, the mortgagor shall not bring a suit to redeem, but within *twenty years* next after the time of obtaining possession, or next after the last acknowledgment of the mortgagee's title or right of redemption, given to him or his agent in writing, signed by the mortgagee. And where there are more than one mortgagor, an acknowledgment given to one shall be as effectual as if given to all; but where there are more than one mortgagee, the acknowledgment shall be effectual only against the party or parties signing it, and those claiming under or after him or them; and if such party or parties be entitled to a divided part of the land, but not to any ascertained part of the mortgage money, the mortgagor may redeem such divided part on payment, with interest, of a proportionate part of the mortgage money. After January 1, 1879, the mortgagor will be barred in *twelve years*. See 37 & 38 Vic. c. 57, s. 7, Appendix C.

² Coote, p. 492.

ranting it—be renewed on application to the Court, even after the decree is signed and enrolled.¹

If the heir of the mortgagor is an infant, a *foreclosure* or *sale*, in the alternative, should be prayed.² And this appears the safer course, also, whenever the security is defective or deficient.³ The general rule is, that all persons having an interest in the equity of redemption must be made parties to a bill of foreclosure.

The Court, in barring the *equity of redemption*, does nothing more; it leaves the mortgagee to enforce at law his *legal rights*.⁴ The mortgagee, there being no special circumstances, may at the same time proceed on all his remedies at law and in equity—*i. e.*, bring his ejectment, file his bill of foreclosure, and proceed on his bond and other collateral securities.⁵ It does not, however, follow that it is always prudent to do so. So anxious is Equity to afford every reasonable relief to the mortgagor, that even after a decree of foreclosure has been signed and enrolled, and the mortgagee has been in possession for many years, nevertheless the Court will, under special circumstances, open the decree. In the case of *Burgh v. Langton*,⁶ the foreclosure was opened after 16 years. In *Cocker v. Bevis*,⁷ and other cases, the Court granted the relief, on fresh evidence adduced on the mortgagor's behalf. An unfair conduct on the part of the mortgagee in obtaining the decree, will of itself open the decree.⁸ No general rule can be laid down as to the grounds on which the Court will open a decree.

¹ *Wakerell v. Delight*, 9 Ves. 36; see 17 Ves. 417.

² See *Booth v. Rich*, 1 Vern. 295; and *Cooté*, p. 493.

³ *Fonblanque*, *Treat. on Eq.* ii. 278, note. ⁴ *Anon.* 2 Ch. Ca. 244.

⁵ *Burnell v. Martin*, Dougl. 417.

⁶ 15 Vin. Abr. 476.

⁷ 1 Ch. Ca. 61.

⁸ *Burgh v. Langton*, *supra*.

The Legal Rights of Mortgagor and Mortgagee.—Subject to what has been said concerning the mortgagor's equity of redemption, and the mortgagee's right to a foreclosure; the relation of mortgagor and mortgagee is that determined by the mortgage-deed, in which it is now usual to insert a power of sale,¹ thus :

'And it is hereby agreed and declared, that it shall be lawful for the said B., his executors, administrators, or assigns, at any time or times, without any further consent on the part of the said A., his heirs or assigns, to sell the hereditaments and premises hereby granted or expressed so to be, or any part

¹ 'Doubts,' says Mr. Coote, 'were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of Equity; but they were groundless. A slight consideration will show they are not within any of the mischiefs intended to be guarded against by the Courts of Equity, for they give nothing to the creditor beyond his principal, interest, and costs; they bestow on him no collateral or ulterior advantage, and they only enable him with promptitude to obtain payment of his mortgage debt.' (*Coote, Mort.* p. 124.) It is a matter of no small regret, that the learned judge who devised equity of redemption and foreclosure, and who, by meddling with the right of contract, has involved landowners and capitalists in the expenditure of millions in needless litigation, did not think of this simple mode of relieving his conscience, and doing speedy justice to both parties; or that, when the right to insert a power of sale in a mortgage deed was recognised, the legislature should not have at once declared such power inserted in every mortgage-deed, and the doctrine of equity of redemption abolished. The one at least has been done, though not the other; for, by the 23 & 24 Vic.c. 145, a power of sale, a power to insure against fire, and a power to require the appointment of a receiver of the rents, or in default to appoint any person as such receiver, have been rendered incident to every mortgage or charge by deed, affecting any hereditaments of any tenure. These powers, however, do not arise until after the expiration of one year from the time when the principal money shall have become payable according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge. (s. 11.) No sale is to be made until after six months' notice in writing. (s. 13.) None of these powers are to be exercisable if it is declared in the mortgage-deed that they shall not take effect; and where there is no such declaration, then, if any variations or limitations of any of the powers are contained in the deed, such powers shall be exercisable only subject to such variations or limitations. (s. 32.)

‘ or parts thereof, either together or in lots, and either by public auction or by private contract, and either with or without special conditions or stipulations relative to title or otherwise, with power to buy in the said premises or any part thereof at any sale by auction, or to rescind any contract for the sale thereof, and to resell the same from time to time, without being answerable for any loss or diminution in price, and with power also to execute assurances, give effectual receipts for the purchase-money, and do all other acts and things for completing the sale, which the said B., his executors, administrators, or assigns shall think proper; and it is hereby agreed and declared that the said B., his executors, administrators, or assigns, shall, with and out of the moneys to arise from such sale as aforesaid, in the first place pay and retain the costs and expenses attending such sale or otherwise incurred in relation to this security, and in the next place pay and satisfy the moneys which shall then be owing upon the security of these presents, and shall pay the surplus, if any, to the said A., his heirs and assigns. Provided always, &c.’¹

The *legal estate* in the land is in the mortgagee, his estate being conditioned to be determined on the date specified for repayment of the money advanced. But though the legal estate is in him, he has not the *possession*; nor is he entitled to possession, except in the case of condition broken. The rights of the parties have, therefore, to be considered with respect to two different periods; viz.,—(1) The period between the date of the mortgage and the day fixed for repayment of the money advanced; and (2) The period subsequent to the date fixed for the repayment. The first we will call the *mortgagee's conditional estate*, the second

¹ Here follows a covenant not to exercise the foregoing power of sale, except in case of default in payment after notice, or of interest being in arrear.

his *absolute estate*, bearing in mind its liability to redemption. When this liability is gone by *foreclosure*, his estate is *absolute both at law and in equity*; subject, however, as already explained, to the possibility of the foreclosure being re-opened.

Strictly, therefore, there are three periods in the history of a mortgage. We will here confine ourselves to the first two, the last having already received its full share of consideration.

Before condition broken.—Though the mortgagor is *in possession*, as the legal estate is out of him, he cannot create any legal estate or interest in the premises; *e.g.*, he cannot make a valid lease for a term of years.¹ On the other hand the mortgagee, though having the *legal estate*, is equally incapable of creating any estate in the premises, for he is *not in possession*. The concurrence of the two is, therefore, requisite. What the actual estate of the mortgagee in possession is, has given rise to no small discussion.²

Upon condition broken.—Upon condition broken, the mortgagee, by virtue of his mortgage, becomes not merely the *legal owner*, but *entitled to possession*, or if the land is in lease, to the receipt of the rents. He may evict the mortgagor without notice or demand of possession,³ and retain the emblements, for the produce of the land is part of his security. If the mortgagor has, subsequent to the date of the mortgage, leased without his concurrence, he may equally evict the lessee; and, in addition to the emblements, has his action for all *mesne profits* not actually paid over to the mortgagor;

¹ See *Doe d. Barney v. Adams*, 2 Cro. & Jerv. 235.

² See long note in *Watkins*, pp. 13—16.

³ *Doe v. Giles*, 5 Bing. 421.

for, from the date of condition broken, the land and its fruits are his, subject to account in Chancery.

Further Mortgages.—One of the results of the doctrine of the *equity of redemption* has doubtless been the frequent giving to the mortgagee of a more ample security for the money advanced than would have been the case had the Common Law doctrine, of forfeiture on condition broken, remained in its integrity. It not unfrequently happens that the owner of land, having in the first instance borrowed, on mortgage of his land, a sum insignificant in comparison with its actual value, finds that sum inadequate to his pecuniary wants. In such cases, he sometimes obtains a second,¹ a third, or more advances upon the same security by way of *further mortgage*, to the original or another or other mortgagees. In this way, indeed, he may and sometimes does obtain, in all, a sum equal or superior to the full value of his property. In which case, should he elect to abandon, so to speak, the pledge to those who have a lien upon it, leaving them to satisfy their claims as best they can out of the spoil, we have to enquire the rights of the respective claimants.

Tacking.—It is a maxim, that ‘He who is first in point of time, is stronger in point of right,’—*Qui priori est tempore, potior est jure*. The first mortgagee is therefore entitled to be first served. Suppose A., the first mortgagee, to have advanced £500; B. subsequently £500; C. subsequently to that, £500; and lastly, A., still later, a further sum of £200; and suppose the full value of the mortgagor’s estate to be £1,400, for which

¹ By 4 & 5 Will. & Mary, c. 16, s. 3, it is enacted that a person twice mortgaging the same lands, without discovering the former mortgage to the second mortgagee, shall lose his equity of redemption.

it is sold. We want to know upon whom the loss of the £300 is to fall. They are maxims of equity, that 'Equality is equity,' and that 'Where the equities are equal, the law shall prevail.' We now come to the consideration of the doctrine of tacking, which, though abolished as from 7th August, 1874, by 37 & 38 Vic. c. 78, s. 7, still exists as to prior transactions.¹

When lands are mortgaged to several persons, each ignorant of the security granted to the other, the general rule is, that the several mortgages rank as charges on the lands, in the order of time in which they were made, according to the maxim, *Qui prior est tempore, potior est jure*.² The same rule applies when each is aware of the securities granted to the other. So, even where the first mortgage extends to further advances, if made by the first mortgagee after notice of the second mortgage, he has no priority over the latter, even though the second mortgagee had notice of the nature of the first mortgage.³ Should, however, the first mortgagee A., as in the case instanced, advance a further sum on his original security, he having, at the time of such advance, no notice of the advances made by B. and C., or either of them; it is clear that, though they are equally innocent, A. has one advantage over the others—the legal estate is in him. Such being the case, Equity, acting upon the maxim that 'Where the equities are equal, the law shall prevail,' allows him—*i. e.*, should the transactions predate 7th August, 1874—to add his second advance to his first, and holds him entitled to payment in full before B. or C. is

¹ See *post*, p. 464.

² See *Jones v. Jones*, 8 Sim. 633.

³ *Rolt v. Hopkinson*, 25 Beav. 461.

entitled to anything. This right of A. is styled his right to *tack*, the act itself is styled *tacking*.

ASSIGNMENT AND TACKING BY ASSIGNEE.—One of the fundamental incidents of property is, as we have already seen, the right of alienation. We have seen that the mortgagor's equity of redemption is an estate no less than the mortgagee's legal estate. Such being the case, either may, of course, assign his interest or property; and as it is a rule that the assignee stands in the shoes, so to speak, of the assignor, his rights are those of the assignor. This consequence follows. If C. can induce A. to assign—*i. e.*, to transfer to him—his (A.'s) mortgage, he (C.) may tack his £500 to that, and thus acquire priority over B.; for, if a third mortgagee who has made his advance without notice of a second mortgage, can procure a transfer to himself of the first mortgage, he may tack his third mortgage to the first, and so postpone the intermediate incumbrancer.¹

Though statute and judgment debts are charges on realty, a statute or judgment creditor cannot, by acquiring a prior or subsequent mortgage, tack it to his estate or judgment, for he did not advance his money on the immediate credit of the land.

By 37 & 38 Vic. c. 78, s. 7, it is enacted that, 'After the commencement of this Act—*i. e.*, after 7th August, 1874—no priority or protection shall be given or allowed to any estate, right, or interest in land, by reason of such estate, right, or interest being protected by or *tacked* to any legal or other estate or interest in such land; and full effect shall be given in

¹ *Brace v. Duchess of Marlborough*, 2 P. Will. 491; *Bates v. Johnson*, 1 Johnson, 304.

every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest, any priority or protection which, but for this section, would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.'

By 37 & 38 Vic. c. 78, s. 4, it is enacted, that 'The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.'

See 28 & 29 Vic. c. 78, entitled 'An Act to enable certain Companies to issue Mortgage Debentures founded on Securities upon or affecting land, and to make provision for the Registration of such Mortgage Debentures and Securities.'

Equitable Mortgages.—Mr. Josiah W. Smith¹ says, 'Besides mortgages created by a formal instrument, and valid at law as well as in equity, there are *Equitable Mortgages*. These are created either by a written instrument, or by a deposit of deeds, with or without writing.² Any written agreement or directions, or

¹ Manual of Equity Jurisprudence, p. 332.

² 'I remember,' says Lord Eldon, 'previously to *Russel v. Russel*, it was very much doubted whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose, resting altogether upon parol; and it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards from favour to that creditor to say, they were

other instrument in writing, which shows that it was the intention of a debtor thereby to make his land or other property a security for the debt, will be equivalent in equity to an actual mortgage by deed, or to a pledge. And a deposit of all or some of the material deeds or documents of title—though they do not show a good title in the depositor, as where they do not comprise the conveyance to him,—if made with a creditor,—whether with or without any written memorandum, and even without a word passing—as security for an antecedent debt, or on a fresh loan of money, constitutes an equitable mortgage.’

‘The deposit will cover subsequent advances, if it clearly appears that they were made upon the faith of that security, or that the original deposit was continued with an agreement for a further advance. The meaning and object of the deposit may be explained by parol evidence.’ An equitable mortgage will not prevail against a subsequent purchaser or mortgagee who had, before the 7th of August, 1874, the legal estate, and no notice of such equitable mortgage.

Elegit.—By Stat. of Westminster 2nd, 13 Edw. I. c. 18 (1286), it is enacted that ‘When a debt is recovered or acknowledged in the king’s court, or damages awarded, the plaintiff shall have his election, either to have a writ of *Fieri facias*, or else that the sheriff shall deliver to him all the chattels of the debtor, saving only

deposited with him for the purpose of securing his debt; and so all the perjury that the Statute (29 Car. II. c. 3, s. 4) meant to avoid is introduced, and the rule changed. But Lord Thurlow was of opinion—and that is not now to be disturbed—that THE FACT OF THE ADVERSE POSSESSION OF THE DEEDS IN THE PERSON CLAIMING THE LIEN, AND OUT OF THE OTHER, WAS A FACT THAT ENTITLED THE COURT TO GIVE AN INTEREST.’ (*Ex parte Coming*, 9 Ves. 115. See *Russel v. Russel*, *White and Tudor’s L. C.* i. 674.)

his oxen and beasts of the plough, and also one-half of his lands, until the debt be levied upon a reasonable price or extent.' On this Statute was framed the old writ of *Elegit*, so called because the creditor elects to take his remedy on the lands. The present writ, the form of which is given in the schedule to the R. G. H. 1853, is founded on the 1 & 2 Vic. c. 110, s. 13, which extends this form of remedy to all lands and interests in realty, whether legal or equitable.

The 2 & 3 Vic. c. 11, s. 5, and 23 & 24 Vic. c. 38, s. 1, have been already noticed.¹ By 27 & 28 Vic. c. 112, s. 1, it is enacted that 'No judgment, statute, or recognizance, to be entered up after the passing of this Act, shall affect any land, of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *Elegit*, or other lawful authority, in pursuance of such judgment, statute, or recognizance.'

The sheriff, however, does not deliver *actual possession* on a writ of *Elegit*, but only *legal seisin*, and the creditor is left to his action of *ejectment* to obtain *actual possession* of the land; on judgment in that ejectment, a writ of possession issues, and a jury is impannelled to ascertain the annual value of the lands delivered by the sheriff.²

¹ *Ante*, p. 351, n. 1.

² See Watkins, p. 444, and Lush's Practice, p. 611.

CHAPTER XV.

ALIENATION EX CONTRACTU QUALIFIED.—LANDLORD AND TENANT IN THE CASE OF THE LETTING AND HIRING OF HOUSES.

HAVING, under their respective titles, considered the legal incidents peculiar to the various estates in realty generally, we will now direct particular attention to the relation of landlord and tenant, in the case of the letting and hiring of houses.

The relation of landlord and tenant is created by a contract of *letting and hiring*,¹ whereby the owner of the realty—styled the *landlord* or *lessor*—lets such realty to another—styled the *tenant* or *lessee*—to hold and enjoy for a *term*, in consideration of a periodical payment, styled the *rent*. The contract is *express* when the terms of the letting and hiring are agreed upon by the parties. It is *implied* when, without express agreement, one is in the *use and occupation*² of the realty of another.

¹ Whatever may be granted for ever may be granted for a time. Leases may be made of all kinds of interests and possessions; not only of lands and houses, but also of goods and chattels, live stock, and incorporeal hereditaments. (*Bac. Abr. Leases* [A].)

² A contract to pay a fair compensation by way of rent for use and occupation, is implied by law from the fact that lands, &c. belonging to one have been occupied by another. The amount of compensation in such cases depends on the value of the premises and on the duration of the occupation. As soon as the occupation ceases, the implied contract ceases; and as no express time is limited for payment, the occupation accrues due from day to day. (*Gibson v. Kirk*, 1 Q. B. 850; *Hollier v. Silleox*, 19 L. J. Q. B. 295.) The action for use and occupation lies

An agreement *to create* the relation of landlord and tenant is not an agreement *which creates* that relation. The former is termed an *agreement for a lease*, the latter is styled a *lease*. An agreement for a lease is an agreement to grant an interest for a *term* in land, and, as such, cannot be enforced as a contract unless evidenced by writing; for, by the 29 Car. II. c. 3, s. 4 (the Statute of Frauds); it is enacted, that no action shall be brought, whereby to charge any person upon any contract or sale of (to sell) lands, tenements, or hereditaments, or (to create)¹ any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

An express contract creating the relation of landlord and tenant, if for a term *exceeding three years* from the date of the agreement, should be *in writing*, and *under seal*; for, unless so evidenced, it creates a mere tenancy *at will*. By the same statute (Statute of Frauds), sec. 1, it is enacted that ‘All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same or their agents thereunto lawfully authorised by writ-

both at Common Law and under the statute 11 Geo. II. c. 19, s. 14, which provides that, when the letting is otherwise than by deed, the agreement, if any, though void for other purposes, may be used as evidence of the *quantum* of the damages.

¹ This portion of the section is held to apply to contracts *to create*, and not to contracts *which create*, an interest in land. (See *Sugd. Vend.* 122 *et seq.*)

ing, shall have the force and effect of leases or estates *at will* only; and, by the 8 & 9 Vic. c. 106, s. 3, such an agreement is declared to be void at law unless made by *deed*.

It must here be observed, that the incidents of the relation of landlord and tenant, as they depend upon the estate created, are determined, as we have already seen, by the law. When the contract is merely *implied* from the fact of *use and occupation*, all these incidents attach to the respective parties. When the contract is *expressed*, it is competent to, and common for, the parties to agree that one or more of these legal incidents shall not attach to that particular tenancy.

Unfurnished Houses.—1. STATE OF REPAIR, &c.—A person who agrees to take an unfurnished house takes it as it stands.¹ There is no implied warranty on the part of the lessor that it is in a fit state for habitation;² nor is the landlord bound to disclose to an intending lessee that it is in a ruinous or dangerous state, for, in the absence of express warranty or active deceit, no action will lie against him for not making the disclosure.³ But if he lets or relets premises in such a state as to create a nuisance,⁴ he is responsible for the nuisance, notwithstanding the tenancy.⁵

¹ Chappell v. Gregory, 34 Bea. 250.

² Hart v. Windsor, 12 M. & W. 68.

³ Keates v. Cadogan, 10 C. B. 591; Judgt. in Hart v. Windsor, 12 M. & W. 87.

⁴ Though there is no duty towards a neighbour cast by the law upon the owner of a house, as to the condition of its repair, so long as it does not, by falling, injure the neighbour in person or property (*Todd v. Flight*, 9 C. B. N. S. 377), yet it is the owner's duty to prevent it from being a nuisance (*Chauntler v. Robinson*, 4 Ex. 163). The tenant only is responsible for a nuisance committed and continued by himself. If, however, the owner demised with an existing nuisance, he is responsible for its continuance. (See Judgt. in *Rich v. Basterfield*, 4 C. B. 797.)

⁵ Gandy v. Jubber, 33 L. J. Q. B. 161; but see 5 B. & S. 485.

2. REPAIRS BY TENANT.¹—A tenant from year to year is bound to keep the house wind and water tight,² but not to re-roof, renew main timbers, or execute other general or substantial repairs.³ It is his duty to use it in a tenant-like manner,⁴ and to make such repairs as putting windows in, or doors that have been broken during his tenancy;⁵ but not to replace doors, windows, or stairs worn out by age.⁶ The cleansing and repairing of drains and sewers is *prima facie* the duty of the tenant (occupier), and does not devolve upon the owner merely as such.⁷ The obligation to repair is more extensive in the case of tenants for terms of years or for life.⁸

¹ OBLIGATION UNDER GENERAL COVENANT TO REPAIR.—Under a general covenant to repair, the tenant is bound to keep the house in substantial repair; the age and nature of the building regulates his obligation (*Harris v. Jones*, 1 Moo. & Rob. 173). If the house is an old one, he is only bound to keep it up as such (if he has not undertaken to improve the value of the property, nor to prevent that diminution to which property in the condition in which he found it, is subject by the natural operation of time. (See *Tindal, C.J.*, in *Gutteridge v. Munyard*, 1 Moo. & Rob. 336.) But, under such a covenant, he is held bound to repair, and even to rebuild the premises, should they be destroyed by fire (*Bullock v. Dommitt*, 6 T. R. 650), or otherwise (*Brecknock Co. v. Pritchard*, 6 T. R. 750), during the term. A covenant introduced to insure, neither removes nor limits his liability. (*Digby v. Atkinson*, 4 Camp. 275—278.)

Hence the wisdom of adding to a covenant to repair the words 'damage by fire or other casualty excepted.'

OBLIGATIONS UNDER A COVENANT 'TO PUT INTO HABITABLE REPAIR.'—This covenant is clearly more onerous than the former, inasmuch as it compels the tenant, should the condition of the premises require it, materially to improve and enhance their value. The covenant, however, must be interpreted by reference to the state of the premises at the time of the demise, their situation, and the class of persons by whom such premises are commonly inhabited; for such a covenant is not an undertaking either to build a new house, or practically to convert it into a different one. (*Belcher v. M'Intosh*, 8 C. & P. 720.)

² *Auworth v. Johnson*, 5 C. & P. 239.

³ *Leach v. Thomas*, 7 C. & P. 327.

⁴ *Horsefall v. Mather*, Holt, N. P. 7.

⁵ Per Lord Kenyon, C.J., in *Ferguson v. —*, 2 Esp. 590.

⁶ *Auworth v. Johnson*, 5 C. & P. 239.

⁷ *Russell v. Shenton*, 3 Q. B. 449. ⁸ *Yellowly v. Gower*, 11 Ex. 294.

3. **REBUILDING.**¹—If the premises are destroyed—*e.g.*, burnt down—during the tenancy, the landlord is not bound to rebuild them.²

4. **RENT.**³—The rent is payable only once a year,⁴ and not until the end of the year.⁵ A payment before that date is voluntary, and does not operate at law as a discharge;⁶ but the tenant may plead, by way of equitable defence, advances made on account of accruing rent.⁷ The rent is legally payable on the land demised.⁸ A tender to an agent authorized to receive payment, is a tender to the landlord.⁹ If the lessors are joint-tenants, the discharge of either is sufficient.¹⁰ So, if tenants in common, unless notice be given to the tenant not to pay the whole rent to one.¹¹ If the house

¹ To avoid the possibility of having to pay the rent without the enjoyment of the premises, or the loss of a valuable business site, it is prudent to insert a covenant to insure against loss or damage by fire, and to see that the insurance is kept up; for, as to London and its vicinity, by the 14 George III. c. 78, s. 83, the governors and directors of the insurance office are authorized and required, upon the request (to be distinctly made before the office has settled with the insurer) of any person interested in or entitled unto any house or other building insured and destroyed or damaged by fire, or . . . to cause the insurance money to be laid out, as far as the same will go, towards rebuilding, reinstating, or repairing such house, &c., unless, &c.; and see 22 & 23 Vic. c. 35, s. 7, as to insurances effected, but not in conformity with the covenants.

² *Bayne v. Walker*, 3 Dow. 233.

³ Rent is not necessarily money. The delivery of given things—*e.g.*, hens, horses, wheat, &c. (*Co. Lit.* 142 a), or the performance of personal services, provided they are certain—*e.g.*, shearing sheep (*ib.* 96 a), the carrying of coals (*Doe v. Morse*, 1 B. & Ad. 365), or the cleaning of a church (*Doe v. Benham*, 7 Q. B. 976), may constitute a rent.

⁴ By agreement the rent may be made payable half-yearly, quarterly, or at other stated periods—*e.g.*, at the two usual feasts of the year, *i.e.*, at Michaelmas and Lady-day, or on the usual quarter days, *i.e.*, the 25th March, 24th June, 29th September, and the 25th December.

⁵ *Finch v. Miller*, 5 C. B. 428.

⁶ *Clun's Case*, 10 Co. R. 127 a.

⁷ *Nash v. Gray*, 2 F. & F. 391.

⁸ *Borough's Case*, 4 Co. R. 73 a.

⁹ *Venning v. Pray*, 2 B. & S. 502.

¹⁰ *Robinson v. Hoffman*, 4 Bing. 562, 565.

¹¹ *Harrison v. Barnby*, 5 T. R. 246.

is destroyed by accidental fire, the tenant is excused the payment of the rent;¹ for 'when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; as, in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused.'² The fact of rent being due, and not paid, gives to the landlord the right to distrain,³ the right

¹ But under a *covenant* to pay the rent during the term, the lessee is bound to pay it, although the house should be burnt down or otherwise destroyed, for the same reason and upon the same principles that he is bound to rebuild—viz., because he has bound himself by an express covenant to do so. (*Pindar v. Ainsley*, cited 1 T. R. 312; *Baker v. Holtzapfell*, 4 Taunt. 46.) However, it is said that if the landlord refuses to rebuild, and yet brings an action of covenant for the rent, a court of equity will grant an injunction to prevent his enforcing payment until he has rebuilt the premises. (See *Id. Northington*, in *Brown v. Quilter*, Amb. 619.)

² See Wms. S. 835.

³ DISTRESS.—A distress is the taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, to procure a satisfaction for a right withheld, as for the non-payment of rent, or for a wrong committed, as injury done by cattle. (*Bl. Com.* iii. 6.)

BY WHOM TO BE MADE.—The distress may be made either by the landlord himself, or by an authorized agent, called a bailiff, under a warrant of distress, signed by the landlord. It does not require a stamp.

WHERE TO BE MADE.—By 52 Hen. III. c. 15, it is enacted that 'It shall be lawful for no man from henceforth, for any manner of cause, to make distress out of his fee, nor in the king's highway, nor in the common street, but only to the king or his officers, having special authority to do the same.' (See also 3 Edw. I. c. 16.) Speaking generally, a thing cannot be distrained for rent-arrear except on the premises demised. (*Per Best, C.J.*, in *Buzzard v. Capel*, 4 Bing. p. 140.) To this rule, however, there are exceptions—viz. (i.) By 11 Geo. II. c. 19, s. 8, the landlord is empowered to seize cattle or stock of the tenant feeding upon any common appendant or appurtenant, or any ways belonging to all or any part of the premises demised. (ii.) By the same statute, s. 1, he is empowered to follow, and, if he can do so within 30 days of the removal, to seize, any goods fraudulently, either openly with notice given to the landlord (*Opperman v. Smith*, 4 D. & R. 33), or clandestinely conveyed away from the premises, unless (s. 2) such goods are *bonâ fide* sold for valuable consideration to some person not privy to the fraud, before such seizure (See *Williams v. Roberts*, 7 Ex. 418); and, by s. 7, the landlord is empowered to break open any house, &c., in which goods so fraudulently removed are secured. Before taking action under this statute, the landlord should satisfy himself

of action,¹ and peculiar rights, as against the tenant's execution creditors.² We have already had occasion to

that the goods removed belonged to the tenant, and that the removal was fraudulent. (*See Cases, Fawcett, L. & T.*, p. 148.)

WHEN TO BE MADE.—A distress for rent must be made between the sunrise and sunset of any day after that on which the rent becomes due at Common Law. The landlord must at Common Law distrain for rent in arrear during the continuance of the lease; and therefore, for the rent due on the last day of the term the lessor could not distrain, because the term was ended (*See Co. Litt.* 47 b.), unless the tenant held over (*but see Wms. S.* ii. 666). By 8 Anne, c. 14, ss. 6 & 7, and since by 3 & 4 Will. IV. c. 42, s. 38, the distress may be made within six calendar months after the end of the lease, provided the landlord's title and the tenant's possession so long continue.

AMOUNT FOR WHICH TO BE MADE.—So long as the relation of landlord and tenant subsists, any arrear of rent, not exceeding six years' arrears, may be recovered. This limit is fixed by the 3 & 4 Wm. IV. c. 27, s. 42, which enacts that 'No arrears of rent, or any damage in respect of such arrears of rent, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent.'

OF WHAT IT MAY BE MADE.—All chattels and personal effects found upon the premises may be distrained, whether they belong to the tenant or a stranger, except—(a) goods of third persons which happen to be upon the tenant's premises in the way of his trade; (b) goods in the hands of a factor; (c) beasts of the plough; (d) goods and utensils of trade, while there is any other property on the premises, or whilst they are in actual use; (e) cattle and goods of a temporary guest at an inn, and (f) fixtures, being part of the freehold; (g) goods in the custody of the law; (h) wearing apparel in actual use; and (i.) animals, *feræ naturæ*. See 2 Wm. & M. Sess. 1 c. 5, s. 3, as to corn; 11 Geo. II. c. 19, s. 8; 56 Geo. III. c. 50; 51 Hen. III. stat. 4, as to cattle and growing crops, &c.; 14 & 15 Vic. c. 25, s. 2, as to growing crops seized and sold under execution, being liable to distress for rent accruing after seizure and sale; 6 & 7 Vic. c. 40, s. 18, as to frames, material, &c., entrusted to workmen; 25 & 26 Vic. c. 89, s. 163, as to distress after commencement of winding up a Company by the Court. But see the 'Lodgers Act,' *post*, p. 481.

¹ **RIGHT OF ACTION.**—When the lease is not by deed, the action may be either for *rent* on the special contract, or for *use and occupation*. (*See* 11 Geo. II. c. 19, s. 14.) If the lease is by deed, the action may be either for rent on the indenture, or on the covenant for payment of rent. When by deed, the action may be commenced at any time within 20 years of the rent becoming due; if not by deed, it must be commenced within six years. (3 & 4 Will. IV. c. 27, s. 42.)

² **LANDLORD'S RIGHTS AS AGAINST EXECUTION CREDITORS.**—By 8 Anne, c. 14, s. 1, it is enacted that 'No goods or chattels whatsoever,

notice his privileges in the case of the bankruptcy of his tenant.¹

3. RATES AND TAXES.—As a general rule, taxes and rates are payable in the first instance by the tenant; but from his next payment of rent he may deduct the landlord's share of the property-tax, sewers' rate, or rent-charge in lieu of tithes, and one-half of the cattle-plague rate;² and, if the tenancy does not exceed three months, any poor rate paid by him in respect thereof.³ He cannot be compelled by the overseer to pay at one time, or within four weeks, a greater amount of the

lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent. When the arrears exceed one year's rent, it is provided that one year's rent only is to be stopped out of the proceeds of the execution in favour of the landlord. By the 19 & 20 Vic. c. 108, s. 75, this provision is declared inapplicable in the case where goods are seized under a warrant of a County Court; in such event, the Act gives the landlord the right, in the case of weekly tenancy, to four weeks' rent; in the case of tenancy for less than a year, to rent of two terms of payment, and in other cases to one year's rent. The 7 & 8 Vic. c. 96, s. 67, limits the right of the landlord, in all other cases, where the tenancy is weekly, to four weeks' rent. See the 'Lodgers Act,' *post*, p. 481.

¹ **LANDLORD'S RIGHTS AS AGAINST TENANT'S ASSIGNEES IN BANKRUPTCY.**—Upon the bankruptcy of the tenant, the landlord should distrain for his rent. He may do so at any time while the tenant's goods remain on the premises, notwithstanding the messenger is in possession, and even after the goods have been sold by the assignees. If the landlord permits the goods to be removed from the premises without distraining, he can only be considered as a common creditor, and must come in *pro ratâ* (*Fawcett*, 185; *but see ante*, p. 271, n. 1). By 32 & 33 Vic. c. 71, s. 34, it is provided that, when the distress is levied after the commencement of the bankruptcy, it is to be available for one year's rent only. As to the residue, he must prove the same as ordinary creditors (s. 35). This Act applies in the case of liquidation by arrangement (s. 125).

² *Fawcett*, 223; 32 & 33 Vic. c. 70, s. 89. ³ 32 & 33 Vic. c. 41, s. 1.

rate than would be due for one quarter of a year.¹ In any case where the owner is liable to pay the poor rates, and neglects to do so, the tenant may pay and deduct the same from his rent.²

6. **QUIET ENJOYMENT.**—A contract for quiet enjoyment is implied upon a parol demise of a tenement. As a part of this implied contract, it is the duty of the landlord, if himself a lessee, to protect his under-tenant from the superior landlord's distress.⁴ The implied indemnity is, however, limited to the wrongful entry of the lessor or of persons claiming under or paramount to him,⁵ and no action will lie upon it for an eviction of the tenant by a stranger.⁶

7. **UNDERLETTING.**—A lessee for years, or from year to year, may, without the consent of his lessor, grant under-leases for any period less than his own term. A demise by a tenant from year to year to another, to hold of him from year to year, is, in legal operation, a demise from year to year during the continuance of the original demise to the intermediate landlord.⁷

8. **ASSIGNMENT.**⁸—Every tenant—a tenant at suf-

¹ 32 & 33 Vic. c. 41, s. 2.

² *Ib.* s. 8.

³ *Bandy v. Cartwright*, 8 Ex. 913.

⁴ See *Judgt. in Hancock v. Caffyn*, 8 Bing. 366.

⁵ See *Smith, L. & T.* 131.

⁶ *Andrew's Case*, Cro. Eliz. 214.

⁷ *Per Parke, B.*, in *Oxley v. James*, 13 M. & W. 209.

⁸ **COVENANTS RUNNING WITH THE LAND OR THE REVERSION.**—We have already seen that a covenant is said to *run with land*, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is said to *run with the reversion*, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion. The leading case referred to in all questions as to whether a particular covenant does or does not run with particular lands or a particular reversion, is *Spencer's case*. (See *Smith's Leading Cases*, vol. 1, p. 43, and *Wm. Savnd.* vol. 1, p. 299 *et seq.*) It may be observed shortly—(1) That at Common Law covenants run with the land, but not with the reversion; (2) That, by 32 Hen. VIII. c. 34, ss. 1, 2, in the case of

ference excepted—has the right to assign.¹ An assign-

leases under seal, assignees of the reversion are entitled to the benefit, and are liable to the burden, of covenants which touch and concern the thing demised, but not to collateral covenants; (3) That this benefit and liability equally attach to (a) an assignee of part of the reversion, and (b) the assignee of the reversion in part of the land (*see* 22 & 23 *Vic.* c. 35, s. 3); (4) By *Geo. II.* c. 28, s. 6, it is enacted that, 'In case any lease shall be surrendered in order to be renewed, the new lease shall be as valid, to all intents, as if the under-leases had been likewise surrendered before the taking of the new lease; and that the remedies of the lessees against their under-tenants shall remain unaltered; and the chief landlord shall have the same remedy by distress and entry for the rents and duties reserved in the new lease, so far as the same exceed not the rents and duties reserved in the former lease, as he would have had in case such former lease had been renewed;' (5) By 8 & 9 *Vic.* c. 106, s. 9, it is enacted that, 'When the reversion expectant on a lease shall be surrendered or merge, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested rights to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease;' (6) As a general rule all implied covenants run with the land; (7) The following express covenants run with the land—(i.) For quiet enjoyment; (ii.) Further assurance; (iii.) Renewal; (iv.) To repair; (v.) To put in repair; (vi.) To leave possession peaceably; (vii.) To leave in good repair; (viii.) To permit free passage; (ix.) To cultivate in a particular manner; (x.) To reside on the premises; (xi.) Not to carry on a particular trade; (xii.) To keep insured against fire buildings within the *bills of mortality*. For other covenants and authority in support of the above, see *Smith's L. C.* vol. 1, p. 43 *et seq.* (8) The liability of the lessee to be sued on his express covenants is not determined by his assigning over his term, and the lessor's acceptance of his assignee (*Barnard v. Godscall, Cro. Jac.* 309), for he may be sued on them either by his lessor or his lessor's assignee (*Brett v. Cumberland, Cro. Jac.* 521), and so may his personal representatives, having assets (*ibid.*) (9.) The assignee of the lessee is liable in covenant for those breaches only which happen while he is assignee; he may therefore get rid of future liability by assigning, even to a mere pauper (*Taylor v. Shum, 1 B. & P.* 21); (10) As to covenants between persons other than those in the relation of landlord and tenant—*i.e.*, (i.) covenants made with the owner of the land to which they relate; and (ii.) covenants made by the owner of the land to which they relate. In the case of the former, the right to sue on such covenants runs with the land to each successive transferee of it, provided that such transferee is in the same estate as the original covenantee was, *e.g.*, the covenant for title. (*See Middlemore v. Goodale, 1 Roll's Abr.* 521, and *see Smith's L. C.* vol. 1. p. 76.) With respect to the latter, great doubt exists whether these in any case run with the lands, so as to bind the assignees of the covenantor. (*See Smith's L. C.* vol. i. p. 60.)

¹ See *Church v. Brown, 15 Ves.* 264.

ment by a tenant at will determines the tenancy, if the lessor has notice, but not otherwise.¹

9. APPLICATION OF PREMISES.—Excluding illegal and immoral purposes, the tenant is free to apply the premises to what purpose he may please,² provided that he does not thereby create a nuisance.

10. WASTE.³—Every lessee of land, whether for life

¹ Pinhorn v. Souster, 8 Ex. 763.

² An agreement based upon an illegal or immoral consideration cannot be enforced; hence, e.g., rent reserved upon a lease of premises used for the purpose of boiling oil or tar, contrary to the provisions of the Building Act, cannot be recovered (*Gas Light Company v. Turner*, 6 Bing. N. C. 324), nor for the purposes of prostitution, when the lessor is aware that the premises are so used. (*Girardy v. Richardson*, 1 Rep. [13].)

A covenant not to exercise any trade or business on the demised premises has been thus construed. The word 'trade' is confined to a business conducted by buying and selling; it does not include the keeping of a private lunatic asylum. (*Doe v. Bird*, 2 A. & E. 161.) The word 'business' includes the occupation of a schoolmaster. (*Doe v. Keeling*, 1 M. & S. 95—99.) A covenant not to carry on any noisome or offensive trade does not include a dangerous trade. (*Hickman v. Isaacs*, 4 L. T. N. S. 285.) A covenant not to carry on the trade or calling of hotel or tavern-keeper, publican or beer-shopkeeper, or seller by retail of wine, beer, spirits, or spirituous liquors, is not broken by a grocer's selling across the counter wines and spirits by retail in bottles only under 24 & 25 Vic. c. 21, s. 2 (*Weekly Notes*, 1870, p. 80).

³ What is waste, is a question of fact. But to constitute waste, the act or omission complained of must be shown to be injurious to the inheritance, either, first, by diminishing the value of the estate, or secondly, by increasing the burthen upon it, or thirdly, by impairing the evidence of title. (2 *Wms. Saun.* [g] 651.) Waste is commonly divided into (1) Legal waste, subdivided into voluntary and permissive, and (2) Equitable waste.

VOLUNTARY WASTE is committed by any act of destruction, such as pulling down houses, or removing wainscots, doors, or windows; or cutting down, destroying, or lopping timber trees, or trees affording shelter to a house, or fruit trees in a garden; or destroying a quickset hedge of whitethorn (*Co. Litt.* 53 a.); or ploughing up strawberry beds in full bearing (*Watherell v. Howells*, 1 Camp. 227); or opening new mines or quarries (*Co. Litt.* 53 b.); by changing the nature of the thing demised, or neglecting to maintain a building, even though such building was erected at his own cost on the demised lands (*Darcy v. Ashwith*, Hob. [234]); converting a corn-mill into a fulling mill (*Judgment in London v. Greyne*, Cro. Jar. 181); turning ancient meadow or pasture into arable land, or arable land into wood, or converso (*Co. Litt.* 53 b.).

PERMISSIVE WASTE consists in suffering the thing demised to fall decay by the want of necessary repairs (*Herne v. Bembow*, 4 Taunt.

or for years, is liable for all *waste* done on the land in lease, by whomsoever committed, for in law it is presumed that the lessee may withstand it—*Qui non obstat quad obstare potest, facere videtur*.¹

11. **FORFEITURE.**—To every lease the law annexes a condition, that, if the lessee does anything that may injuriously affect the lessor, the lease shall be void, and the lessor may re-enter.² Any act, therefore, by the lessee, by which he disaffirms or impugns the title of his lessor, works a forfeiture of his lease,³ and subjects him to ejectment.

764); but it is not waste at Common Law to leave land uncultivated. (*Per Parke, B., in Hutton v. Warren*, 1 M. & W. 472.) See 'Repair,' *ante*.

EQUITABLE WASTE comprehends acts or omissions not deemed waste at Common Law. See the incidents of the various estates in realty, *e.g.*, Fee simple, fee tail, mortgage. See Index, 'Waste.'

¹ *Attersoll v. Stevens*, 1 Taunt. 196—201; Wms. Saund. ii. 658.

² *Bac. Abr., Leases*, T. ii. 884.

³ Thus a forfeiture is incurred by the tenant by the making of a claim by action to the premises, or by acknowledging the fee to be in a stranger (*Bac. Abr.: Leases*, T. ii. 884); but a mere verbal denial of the landlord's title (*Doe v. Wells*, 10 A. & E. 427), or a payment of the rent by a tenant for a term of years to a third person, does not. (*Doe v. Parker*, Gow. 180.) The forfeiture may be incurred by breach of *express* condition.

EXPRESS CONDITIONS are of two kinds; viz., (1) such as merely prohibit the doing of certain things, *e.g.*, that the lessee shall not assign; and (2) such as expressly provide for re-entry on the doing of certain things. In either case, the doing of the prohibited act gives to the lessor the right to maintain an ejectment; but in neither case does it make the lease void, for, were it to do so, that would be to permit a lessee to relieve himself from the burden of his lease by the mere performance of a wrongful act (*Judgment of Bayley, J., in Doe v. Banks*, 4 B. & A. 406); the tenancy will therefore continue till the lessor, by some act of his, shows his intention to determine it. (*Judgment in Roberts v. Davey*, 4 B. & Ad. 671.)

WAIVER OF FORFEITURE.—But, on the other hand, the law does not allow the landlord to keep the tenant in perpetual uncertainty as to the result of his wrongful acts, and holds certain acts on his part to be *waivers of the forfeiture*; *e.g.*, in the case of forfeiture for non-payment of rent, the subsequent acceptance of it, or action brought or distress levied for it, is a waiver; but the acceptance of the rent, after action of ejectment commenced for the forfeiture, is not a waiver, as the bringing of the action showed the election to treat the wrongful act as a forfeiture. (*Jones v. Carter*, 15 M. & W. 718.)

12. EJECTMENT.—By 15 & 16 Vic. c. 76, s. 210, it is enacted that ‘When one half-year’s rent shall be in arrear, and the landlord to whom the same is due hath right by law to re-enter for the non-payment thereof,¹ such landlord may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises; or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord may affix a copy thereof upon the door of any demised messuage, or, in case such action in ejectment shall not be for the recovery of any messuage, then, upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment; and such affixing shall be deemed legal service thereof, and shall stand in the place of a demand and re-entry, and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year’s rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter; in such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.’

Furnished Houses—*The Letting and Hiring of.*—It has been held, that upon the demise of a furnished house, since the bargain is not so much for the house as for the furniture, there is an implied condition that it

¹ See *Doe v. Roe*, 7 C. B. 134.

shall be reasonably fit for immediate habitation.¹ It is a breach of this condition—whether expressed or implied—if the house, or any of the rooms, are infested and overrun with bugs. To justify the tenant, however, in quitting without notice, it must appear that the nuisance exists to a serious and substantial extent, and is such as he could not reasonably be expected either to endure or to extirpate.²

Lodgings.—Lodgers' Goods.—By the 34 & 35 Vic. c. 79, it is enacted (s. 1), 'If any superior landlord shall levy or authorise to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and

¹ *Smith v. Marrable*, 11 M. & W. 5.

² *Campbell v. Wenlock*, 4 F. & F. 716.

if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.'

Sec. 2. 'If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate; and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just; and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.'

Sec. 3. 'Any payment made by any lodger pursuant to the first section of this Act shall be deemed a valid payment on account of any rent due from him to his immediate landlord.'

CHAPTER XVI.

ALIENATION EX CONTRACTU QUALIFIED.—INTERESTS
IN PERSONALTY.

THE terms *bailee* and *bailment* are derived from the French word *bailler*, to deliver. A bailment is, therefore, the delivery of some *thing*, and may be defined to be 'the delivery of goods by one called the *bailor* to another called the *bailee*, for a purpose expressed or implied, which delivery, though transferring the *possession* of, does not transfer the *property* in, the goods so delivered.'¹ Bailments are divided by Holt, C.J., in the case of *Coggs v. Bernard*,² into six classes; viz.—

(1) *DEPOSITUM*, in which case the goods or chattels are delivered to the bailee for the sole purpose of being taken care of for the bailor by the bailee *gratuitously*. (2) *COMMODATUM*, where goods or chattels useful to the bailee are lent to him *gratis* by the bailor, to whom they are to be returned, the time and purpose of the loan being fulfilled. (3) *LOCATIO ET CONDUCTIO*, which differs from the last, *i. e.*, from *commodatum*, in that the goods or chattels are let for hire, instead of being lent *gratis*. The bailor is the *locator*, the bailee the *conductor*. (4) *VADIUM*—*i. e.*, *pledge* or *pawn*—occurs

¹ For, if the transfer passed the property in the thing transferred, the transaction would not be a *bailment*, but a *sale*, *exchange*, *barter*, or *gift*.

² See Smith's Leading Cases, vol. i. p. 171; and see *ante*, p. 314, note 1.

when goods or chattels are delivered by the bailor to the bailee, as a security for money borrowed by the former of the latter, or for the due performance of some promise.¹ (5) *LOCATIO OPERIS FACIENDI*, where goods or chattels are delivered by the bailor, to be carried, or for something to be done to or about them, by the bailee, for *reward*. (6) *MANDATUM*, which differs from the last in that the service is to be rendered by the bailee *gratis*.

Every bailment, therefore, is a delivery and acceptance of a given thing, for a purpose specified or implied. When the bailor and bailee are contractors, the subject of the contract is the thing bailed, the object of the contract is that which determines the species of bailment to which it belongs. As preliminary to the consideration of the several classes of bailment, it may be observed, that—(1) Common to all is this, that the possession of a given thing for a given purpose is transferred by the bailor to the bailee, and (2) that, in each case, a benefit or service is rendered, either by the bailor to the bailee, or *vice versa*, or reciprocally; for (i.) in three of the classes—viz., *Depositum*, *Commodatum*, and *Mandatum*, the benefit or service is rendered gratuitously; (ii.) in the case of *Locatio operis faciendi*, the service rendered is for the sake of reward proper; (iii.) in the case of *Locatio et conductio*, one thing is paid for the use of another; and (iv.) in the case of *Vadium*, the thing deposited is lodged as a collateral security for the fulfilment of a principal contract; or, in other words, in the case of *Vadium*, there are two contracts, viz., a *principal*, and a *collateral*; the

¹ See *post*, 'Pawn,' 494.

collateral being the bailment, the condition of which is the fulfilment of the principal contract, viz., the contract of loan, &c.¹

The acts designated by the generic term *bailment*, and its six species, have each duplex incidents, viz., those attached by the law, and those attached by the parties in each individual case, to which latter it is unnecessary for us here to allude. By styling the former the *duty*, and the latter the *obligation*, we may make the general principle of the law of bailment clear, with the assistance of the following simple illustration:—

1. As an example of DEPOSITUM.²—A., the bailor, entrusts to the custody of B., the bailee, his horse, till his (A.'s) return from Paris.

2. COMMODATUM.—A. lends B. his horse to ride, for the purpose of visiting a friend.³

3. LOCATIO ET CONDUCTIO.⁴—A. lets his horse to B., for one month, for the sum of £10.

4. VADIUM.⁵—A. having borrowed £50 from B., for a week, deposits his horse with B. as security for the punctual repayment of the same.

5. LOCATIO OPERIS FACIENDI.⁶—A.'s horse being ill,

¹ See 'Pawn,' *post*, 494.

² A depositary has, as a general principle, no right to use the thing entrusted to him (*Clark v. Gilbert*, 2 Bing. N. C. 356); but see 'Pawnee's duty to account, and rights to use the pawn,' *post*, p. 497, n. 3.

³ The loan being to the bailee to ride himself, he is not at liberty to allow anyone else to ride the horse. (*Bringle v. Morrice*, 1 Mod. 210.)

⁴ The bailee, not being a veterinary surgeon, should he take upon himself to prescribe for the horse, in the event of its being ill, would be liable, for no prudent man would do so, the horse being his own. (*Deane v. Keste*, 3 Camp. 4.)

⁵ See *post*, 'Pawn,' 494.

⁶ This class embraces innkeepers, carriers, warehousemen, wharfingers, and tradesmen or artificers who take the goods of another to work at or upon—*e.g.*, tailors who take cloth to make up into a garment, or jewellers who take jewels, &c., to set. But, as distinguished from all other bailees of this class, the condition of inn-

he sends it to B. in order that he may do his best to

keepers and common carriers is peculiar, their liability being greater than that of the rest.

INNKEEPERS.—The leading case upon this subject is *Calye's case*. (See *Smith's L. C.*, Vol. 1, p. 102.) We may here observe—(1) That an inn is a house where a traveller is furnished with everything he has occasion for while on his way. (*Thompson v. Lacy*, 3 B. & A. 283.) A mere coffee-house is not an inn, at least not within the meaning of a fire policy (*Doe v. Laming*, 4 Camp. 77), nor is a boarding house (see *Dansey v. Richardson*, 3 E. & B. 144). (2) The mere fact of a person being an innkeeper does not preclude his contracting, even as to a portion of his inn premises, in a capacity other than that of innkeeper; e.g., he may, even to a guest, let a portion of his house, to which, or for a purpose for which, the guest as such was not entitled, as, for instance, one room as a show room for goods. (*Burgess v. Clement*, 4 M. & S. 306.) He may, as livery stable keeper, receive a carriage and horses to stand at livery. (*Smith v. Dearlove*, 6 C. B. 132.) He may undertake the custody of goods of another, as ordinary warehouseman. (*Hyde v. Mersey & Trent Navigation Co.*, 5 T. R. 394.) He may take in a person on a special contract to board and lodge there, in which case he is a boarder and not a guest. (*Parkhurst v. Foster*, Sal. 387.) In neither of which cases is the relation of innkeeper and guest established by the contract between the parties to it. (3) It is not necessary, in order to constitute a man a guest, that he should have come for more than a temporary refreshment. (*Bonnett v. Mellor*, 5 T. R. 273.)

(4) As to the liability of the innkeeper to his guest, Lord Ellenborough, in the case of *Burgess v. Clements* (4 M. & S. 310), said, 'The law obliges the innkeeper to keep the goods of persons coming to his inn *causâ hospitandi*, safely; so that, in the language of the writ, *Pro defectu hospitatoris hospitibus damnum non eveniat ullo modo*.' So long as the relation of innkeeper and guest subsists, and so long as the goods of the guest are in the custody of the innkeeper, he is responsible for their safety, and liable should they be stolen (*Richmond v. Smith*, 8 B. & C. 9; but see 26 & 27 Vic. 41), or damaged (*Dawson v. Chamney*, 5 Q. B. 164). This liability, however, is not unqualified, for the innkeeper is relieved if it appears that the loss was in fact occasioned by the negligence of the guest, i.e., that it would not have occurred, if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances. (See *the Judgment in Cashill v. Wright*, 6 E. & B. 900.)

(5) By way of compensation for the additional liability, *inter alia*, the innkeeper has a lien for his charges, which lien attaches to any goods brought to the inn by the guest, though not his own. (*Robinson v. Walter, Bulst.*, Part iii. p. 269; *Smith's L. C.* i. 110.) It does not, however, attach to goods sent by a stranger to the guest in the inn for a temporary purpose, e.g., a piano upon hire. (*Broadwood v. Granara*, 10 Exch. 417.)

COMMON CARRIERS.—A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him—e.g., a proprietor of waggons, barges, lighters,

cure it, promising to pay B. for his services and atten-

merchant ships, or other instruments for the public conveyance of goods. (*See Coggs v. Bernard, Smith's L. C., Vol. 1, p. 198.*) A person who conveys passengers only is not a common carrier (*Aston v. Heaven, 2 Esp. 533*); nor is a town carman, who does not ply from one fixed terminus to another, but undertakes casual jobs (*see Brind v. Dale, 8 C. & P. 207*). As to the liability of a cab proprietor for passengers' luggage, see *Ross v. Hill, 2 C. B. 877*; of a railway company to a servant whose fare has been paid by his master, *Marshall v. The York, Newcastle, & Berwick Ry. Co., 11 C. B. 655*.

Concerning common carriers, we may remark that—(1) A common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage is already full, or the risk sought to be imposed upon him is extraordinary, or the goods of a kind that he cannot convey, or is not in the habit of conveying. (*Jackson v. Rogers, 2 Show. case 330.*) (2) When anything is tendered to the carrier for carriage, it is, speaking generally, his duty to ask all necessary questions concerning it; and if no question is asked, there being no fraud upon the part of the bailor, the carrier is bound to carry the parcel as it is. (*See Parke, B., in Walker v. Jackson, 10 M. & W. 168.*) (3) The hire must be reasonable, but at Common Law there is no duty to carry for all customers at equal rates. (*Baxendale v. Eastern Counties Ry. Co. 4 C. B. N. S. 63, 78, 83.*) The carrier may, however, by injunction, be restrained by the Court of Common Pleas from giving undue preference. (*See Re Caterham Ry. Co., 1 C. B. N. S. 410, and The Regulation of Railways Act, 1873.*) (4) While the goods are in the carrier's custody as carrier, he is bound to take the utmost care of them, and is at Common Law responsible for every injury sustained by them, by whatever means occasioned, the act of God or the king's enemies alone excepted. (*Dale v. Hall, 1 Wils. 281.*) He is bound to take proper means for their preservation. In one case it was held to be within the scope of the duty of a railway company employed to carry quicks, to plant or to allow them to be planted in their own land for that purpose. (*Giles v. Taff Vale Ry. Co., 2 E. & B. 823.*) (5) When the goods have arrived at the end of the transit, it seems that the carrier is bound to keep them a reasonable time at his own risk for the owner, during which period his liability as carrier continues (*Hyde v. Trent Navigation Company, 5 T. R. 389*); but, after that time, his liability is reduced to that of an ordinary deposites. (*See Lord Abinger in Cairns v. Robins, 8 M. & W. 263.*) What is reasonable time must depend upon the nature of the individual case. It is a question of fact, and for the decision of the jury. (6) If the consignee refuses to receive the goods when tendered by the carrier, the carrier is not bound to acquaint the consignor of that fact, but is bound to do what under the circumstances is reasonable. (*Hudson v. Baxendale, 2 H. & N. 575.*) (7) The 11 Geo. IV. and 1 Wm. IV. c. 68, s. 1 (The Land Carriers Act), enacts that 'No common carrier by land for hire shall be liable for the loss of or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets, bills, bank notes, orders, notes or securities for payment of

tion to it.

money, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks—manufactured or unmanufactured, wrought up or not wrought up with other materials,—furs or lace (this does not include machine-made lace, 28 & 29 Vic. c. 94), contained in any parcel, when the value exceeds the sum of £10, unless at the time of delivery the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. By s. 2, the carrier is entitled to charge extra for parcels containing such goods, but must signify his intention so to do by notice suspended in his office, or, by s. 3, his right to the extra charge is forfeited, though, it seems, not his right to a declaration of the value and nature of the goods (*Hart v. Bazendale*, 6 *Exch.* 769). By s. 4, the power to limit his responsibility as to articles not within the Act, as theretofore by public notice, is withdrawn; and, by s. 8, the Act is deemed not to protect carriers from their liability to answer for loss occasioned by the felonious acts of their own servants, nor is it to protect the servant from answering for his own neglect or misconduct.

(8) SPECIAL CONTRACTS.—This Act, however, does not prevent carriers from making special contracts with their customers, which special contracts will be supported by our courts when legal and reasonable. Their title to support, on the ground of legality, in no way differs from contracts in general. Their necessity to be reasonable arises from the fact of carriers having, to a certain extent, a *monopoly*, which, if uncontrolled, might be unjustly exercised. The question of reasonableness is generally a mixed question of law and fact. (*Simons v. Great Western Railway Co.*, 18 *C. B.* 865.) The advantage taken by railway companies of their monopoly, induced the 17 & 18 Vic. c. 31, 'The Railway and Canal Traffic Act, 1864.' By s. 2, such companies are required to 'afford all reasonable facilities for the receiving and forwarding and delivering of traffic,' &c.; by s. 3, complainants are empowered to seek redress of their grievances by motion or summons to the superior courts; by s. 4, the judges are empowered to make such regulations as shall appear necessary; by s. 7, the company is declared liable for neglect or default in the carriage of goods, notwithstanding notice to the contrary; but such liability is limited, in the cases mentioned, to the amounts specified in the section, unless the value of the property is declared, and an extra payment made, 'provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable.' See The Regulation of Railways Act, 1873. (9) The general Act now in force as to carriers by water, is the 17 & 18 Vic. c. 104, see sections 502 to 516. (10) When goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue (*Dewes v. Peck*, 8 *T. R.* 330), unless the consignee is the agent of the consignor (*Sargent v. Morris*, 3 *B. & A.* 277), or the carrier has

6. **MANDATUM.**¹—A.'s horse being ill, he entrusts it to B., who promises that he will endeavour to cure it without making any charge for his services.

This important consequence flows from the mere fact of a *bailment* being made, that, whatever may be the nature of the bailment, *i.e.*, to whichever of the classes it belongs—whether it is a *trust* or a *contract*—there is a reciprocal undertaking, promise, or assurance concerning the thing bailed. On the part of the bailor, there is the undertaking that it is fit for the purpose for which it is bailed; and on the part of the bailee, that it shall be used for or put to that purpose only; for, says Coleridge, J.,² ‘Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible?’

Again, this further consequence follows from the mere fact of the deposit being made and accepted, *viz.*—that there is an *undertaking* on the part of the bailee. Were it not for this *undertaking* or *promise* to

specially contracted to be liable to the consignor (*Moors v. Wilson*, 1 T. R. 659). Where the property in the goods has not yet passed, unless the carrier has specially contracted with the consignee, the consignor should sue—*e.g.*, where goods are sent for approval (*Swain v. Shepherd*, 1 M. & Rob. 224), or the agreement for sale is void under the Statute of Frauds (*Coates v. Chaplin*, 3 Q. B. 483). See 29 & 30 Vic. c. 69, entitled ‘An Act for the amendment of the law with respect to the Carriage and Deposit of Dangerous Goods;’ as to Petroleum, 34 & 35 Vic. c. 105.

¹ The liability of the mandatary is the same as that of the depositary, *i.e.*, for gross negligence only. (*Beauchamp v. Powley*, 1 M. & Rob. 38.) He is of course bound to use the skill he possesses, for the non-use of it would be gross negligence. (*Wilson v. Brett*, 11 M. & W. 213.)

² *Blakemore v. Bristol & Exeter Ry. Co.* 8 E. & B. 1061.

take charge of the thing bailed, the bailee, at all events in those cases where the service is gratuitous, could not with reason be expected to take more care of the property of another than he does of his own; but when he *promises* to take care of the property of another, which he is held to do by the mere fact of taking it into his charge—for by doing so, where there is no *obligation*, he accepts a *trust*—he thereby excludes himself from saying, in the event of loss or injury to the property, resulting from negligence on his part, ‘You knew me to be a grossly negligent man about my own things, and ought not to expect me to take more care of your things than you know I do of my own.’ It is, then, reasonable, and it is law, that whatever may be a man’s habits as to his own, if he becomes the *bailee* of the property of another, though without reward, for the consequences of his *gross negligence* he will be held responsible.¹ A gratuitous bailee, the bailment being for the benefit of the bailor, is not liable for anything short of *gross negligence*. There are, as we have seen, as to the benefit of the parties, three cases; viz.—

- (1) Where the bailment is for the benefit of the *bailor*;
- (2) Where it is for the benefit of the *bailee*; and
- (3) Where it is for the *mutual benefit of bailor and bailee*.

We have seen that where the bailment is for the benefit of the *bailor*, and *without reward* to the bailee, that the bailee is liable only in the case of gross negligence. Applying the same mode of reasoning to the second case—that is, where the bailment is made by the bailor, without reward to him, and for the sole benefit of the bailee—it would be but reasonable to conclude that the bailee should be required to exercise the *utmost*

¹ *Doorman v. Jenkins*, 2 A. & E. 256; *Rooth v. Wilson*, 1 B. & A. 61.

diligence and care, in the preservation of the thing entrusted to him, it being so entrusted for his exclusive benefit; and such is the law, for in the case of *commodatum*, the bailee is held liable for *slight negligence*—indeed, he is held to represent himself to the bailor as a person of competent skill to take care of the thing lent.¹ The third case remains, that in which the bailment is for the mutual benefit of bailor and bailee. It therefore necessarily takes the middle position between the two former. It is not necessary that there should be *gross negligence* in order to make the bailee liable; on the other hand, he cannot be held liable for *slight negligence*. Between the two there is such diligence as a *prudent man would exercise towards his own*. The bailor has no right to expect more, the bailee cannot be supposed to have promised less.² He is not expected to anticipate and provide against extraordinary dangers; but if an uncommon or unexpected danger does arise, he is bound to use efforts proportioned to the emergency to ward it off.³

In connection with bailments, three subjects call for special notice; viz., *Bills of Lading*, *Lien*, and *Pawn*.

A Bill of Lading.—A bill of lading is a written contract between the master or captain of a ship, on behalf of his principals, the shipowners, on the one part, and the person named as shipper of the goods on behalf of the person who, at the time of shipment, is his principal, on the other part, by which it is agreed that the shipowners shall deliver the goods—the subject of the contract—to a third person, styled the *consignee*.

¹ See *Wilson v. Brett*, 11 M. & W. 115, per Parke, B.

² See *Dean v. Keate*, 3 Camp. 4.

³ *Leck v. Maestair*, 1 Camp. 138.

When signed by the master, the *bill of lading* is an acknowledgment under his hand that he has received such goods, and of his undertaking to deliver them to the consignee or his assignee. A bill of lading is a *negotiable instrument*. Being such, as a general principle, endorsement of it by the consignee to another, styled his assignee, vests the property—the subject of the contract—in that assignee, who, by like means, may vest it in his assignee, and so on *ad infinitum*. It does not, however, follow that the mere endorsement of the bill of lading changes the property in the goods, the subject of that bill.¹

Lien.²—The right of lien is either by Common Law or by agreement. By the Common Law, it is the right given to every one who, by request, and for reward, has bestowed labour and skill on, and in the alteration and improvement of, the personal property of another, to retain possession of such property till payment for the services rendered. It does not arise in the case of mere outlay³ incurred upon or for the property.

By agreement, the right of lien may either be granted where denied by the Common Law, or taken away where given by it. The agreement may be either in express terms, or by necessary implication, arising from the nature of the subject-matter,⁴ or by usage common to a trade or peculiar to the parties, as evidenced by their former dealings with each other.

¹ See *Evans v. Marlett*, 1 Lord Ray. 271; *Wright v. Campbell*, 4 Burr. 2051; *Caldwell v. Ball*, 1 T. R. 205.

² See *Smith's Mercantile Law*, pp. 553—561.

³ A livery stable keeper has no lien for the keep of a horse, nor an agister for its agistment, though a trainer has for the cost of *keep and training*; so has a miller for *grinding corn into flour*, a shipwright for *repairing a ship*, and the like. (See *Smith's M. L.* p. 555.)

⁴ For example, an agreement stipulating for payment in a particular manner, and out of a particular fund, rebuts the notion of a lien.

There are two species of lien known to the law, viz., *particular* and *general*. 'Particular lien' attaches to the specific goods in respect of which the debt arises. 'General lien'¹ is claimed in respect of a general balance of account. The lien attaches to the *goods*, not to the *person*, of the debtor; consequently transmutation of ownership does not affect the lien.

The lien being incidental to *possession*, it is lost with the *loss of possession*. Loss of possession, in the case of lien, is not confined to the actual parting with the possession of the goods; it extends to any change in the character of the holding,² and any claim to retain possession, based upon an alleged right other than the lien, is held to be a waiver of the lien. It is also lost by abusing the goods, *e.g.*, by selling or pledging them. As the lien arises by virtue of debt, either payment, the accepting of a security for the payment of the same debt payable *in futuro*, any new arrangement as to mode of payment, or a tender of the amount justly due though less than that demanded, destroys it, as does a refusal to accept that amount, even though there be no tender. So long as the lien attaches, the goods cannot be seized in execution for the debts of the real owner.³

¹ **GENERAL LIEN.**—General lien did not exist at Common Law. It therefore depends upon the agreement of the parties, expressed or understood, or upon the usage of trade, and the decisions of the Courts of Law thereon; *e.g.*, a factor has a lien on all the goods in his hand, as factor, for the balance of his customer's general account; an attorney upon the papers of his client, which have come into his hands in the course of his professional employment; a banker upon the securities of his customer to whom he has advanced money, but not on muniments pledged for a specific sum, or negotiable instruments belonging to a third person, though lodged by a customer; so has a calico-printer, a dyer, and a wharfinger, provided it be the custom of that place; a fuller has not.

² For instance, if the person having the lien causes the goods to be taken in execution at his own suit, and then purchases them.

³ For cases in support of these several propositions, see Smith's Mercantile Law, p. 553 *et seq.*

Pawn or Pledge.¹—The contract of pawn may be defined² to be the bailment³ made by one, styled the pawnor, and accepted by another, styled the pawnee,⁴

¹ See, *The Contract of Pawn*, by Francis Turner.

Sir William Jones defines pawn to be 'a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged.' (*Treatise on Bailments*, p. 118.) Lord Holt, mentioning pawn as the fourth class of bailments, says, 'It is when goods or chattels are delivered to another as a pawn, to be a security for money borrowed of him by the bailor, and this is called in Latin *vadium*, and in English a *pawn* or *pledge*.' (*Coggs v. Bernard*, *Ld. Raymond*, 909. See *Smith's L. C. i.* 171.)

² See Bailor and Bailee, as to their rights, duties, and obligations in general, and of bailees for valuable consideration in particular.

³ Though, like all other contracts, that of pawn may be made by any citizen competent to contract, those who make a business of lending money upon the pledge of personal property—*i.e.*, those who exercise the trade or business of a pawnbroker—are controlled in such business by the 35 & 36 Vic. c. 93, which, by s. 6, declares the following to be pawnbrokers within the meaning of the Act—*i.e.*, 'every person who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives or takes in goods or chattels, and pays or advances or lends thereon any sum of money not exceeding £10, with or under an agreement or understanding, expressed or implied, or to be, from the nature or character of the dealing, reasonably inferred, that those goods or chattels may be afterwards redeemed or repurchased on any terms.' By sec. 37, all such persons are required, under a penalty of £50, to take out yearly an excise license. Sec. 15 and sched. 3 limit and determine the rate of profit a pawnbroker is allowed to take. Sec. 12 requires all pawns to be entered in books by the pawnbroker, who is, by sec. 14, further required to give a pawn-ticket to the pawnor. Sec. 15 enacts that, if required, the pawnbroker shall give a receipt for the amount of loan and profit received, when the pledge is redeemed. Secs. 33 & 34 impose penalties for unlawfully pawning, or attempting to pawn, the property of others; sec. 32 for unlawfully receiving; and sec. 34 empowers the pawnbroker to detain the person tendering or the thing tendered under either of the circumstances therein described. Sec. 35 directs that persons knowingly taking in pledge unfinished goods or linen, or apparel entrusted to others to wash or mend, shall forfeit not more than double the sum lent, and restore the goods. Sec. 36 empowers peace-officers to search for unfinished goods, &c., and to restore them to the owner. Sec. 30 requires the pawnbroker to restore goods unlawfully pawned. Secs. 16, 17, and 18 determine the time within which pledges are redeemable. Sec. 25 empowers the pawnbroker to deliver up the goods to any person producing the pawn-ticket, upon payment of the loan and profit, within one year and seven days, or before sale, as the case may be. (See secs. 17 & 19.) Sec. 29 makes provision for the case where the pawn-ticket is lost. Sec. 17 makes goods pawned for 10s. or less the absolute property of the pawnee, if not redeemed within one year and seven days. Sec. 19 requires pledges above that value to

of the goods or chattels personal¹ of the pawnor,² as a pledge or collateral security³ for the due performance of a principal contract.⁴

Though the pledge is commonly made to secure the payment of money lent, it is not necessarily so⁵.

PAWNEE'S INTEREST.—By the bailment a *qualified property* only in the thing pledged is passed by the pawnor to the pawnee; for, as Fleming, C.J., observed, 'Pledging does not make an absolute property, but is a delivery only until payment, &c., and may be re-demanded at any time upon payment of the money; for it is delivered only as a security for the money lent, and there is a difference between the mortgaging of lands and the pledging of goods; for the mortgagee has, at law, an

be disposed of, if at all, by public auction. Sec. 22 compels the pawnbroker to account for the surplus, on sale within three years, subject to set-off. Sec. 27 makes the pawnbroker liable for the pledge, if destroyed or damaged by fire, and determines the extent of such liability. Sec. 28 renders him liable also for depreciation in value, resulting from negligence in the bailment. By sec. 24 he is empowered to make special contracts, subject to certain restrictions. There are 57 sections in all, which see.

¹ Real estate may be *mortgaged*, it cannot be *pawned*. A government officer cannot assign his future accruing pay. Assignments, whether by way of pawn or otherwise, involving Champerty or Maintenance, are illegal. Chattels, bills, choses in action, money and all other forms of personal property, may be pawned by their owners. As to the various Acts concerning State property—*e.g.*, military and naval stores, the clothes and accoutrements of government servants, &c.—see Turner's Contract of Pawn, pp. 31—39.

² As to pawn by persons having no property or but a qualified property in the goods, see *post*, 498, n. 1.

³ Story says, 'It is of the essence of the contract, that the thing should be delivered as a security for some debt, or engagement, whether of the pawnor or some other person. The delivery may take place on account of a future as well as of a past debt or engagement, upon condition or absolutely, for a limited time or for an indefinite period.' (*Bailments*, s. 300.) If the pawn be given in the way of a guarantee for a third party, it will be as good, and the pawnee will have the same rights, as if it were pledged on the pawnee's own account; as when A. deposited money with B. as security for the delivery of goods by him. (*Isaack v. Clarke*, 2 Bulst. 306.)

⁴ See Contracts of Indemnification, 'Principal and Surety.'

⁵ See note 3.

absolute interest in the land, whereas the other has but a special property in the goods, to detain them for his security.¹ The performance, therefore, of the principal contract on the part of the pawnor, immediately revests in him his original property in the thing pledged. Hence, in the case of money lent, a refusal to deliver the pawn upon payment or tender of payment of the money lent, will support an action for trespass on the case.² Another consequence that flows from the contract of pawn passing a mere qualified property, is this,—that, even should the parties insert in their contract a clause providing that, if the terms of the contract are not strictly fulfilled, the pledge shall be irredeemable, such clause is of no effect, for the non-fulfilment of the principal contract does not change the nature of the collateral. The right given by the collateral contract is, upon breach of the principal contract, to sell³ the pledge, and out of the proceeds to retain sufficient to satisfy the principal contract.⁴ If the pawnee does not exercise the right, the property remains with him in its character as *pledge*; and, upon a tender of the debt at any time, he is bound to restore it.⁵ The pawnor's right to redeem is not affected by

¹ *Ratcliff v. Davies*, Cro. Jac. 245.

² See *Isaack v. Clarke*, 2 Bulst. 309.

³ See *post*, 498, n. 3.

⁴ INTEREST.—The pledge applies not only to the debt or other engagement, but also to the interest and all the incidental charges and expenses due thereon. If, for instance, a pledge is for a debt, it covers the interest upon the debt. If interest is expressly stipulated for, it follows, from the presumed intention of the parties, that the pledge is to cover both principal and interest. If interest is not stipulated for, and yet is due *ex morâ*, because of the unjust delay of the pledgor to pay the debt when he ought, that also, in equity, is required to be paid as well as the principal, before a redemption of the pledge is allowed; for here the rule of the Roman law justly applies—*Minus solvit, qui tardius solvit; nam et tempore minus solvitur*. (*Story on Bailments*, s. 306.)

⁵ See *Glanville*, lib. 10, ch. 6. *Story on Bailments*, ss. 345, 346.

the Statutes of Limitation,¹ unless, perhaps, where a certain day has been fixed by the parties as that on which the redemption shall take place.² Again, from the fact that the pledge is deposited solely as a security, it follows that, as a general proposition, the pawnee has no right to derive any other benefit from the property so pledged.³

From the fact that one cannot legally grant to

¹ *Kemp v. Westbrook*, 1 Ves. 278.

² See Lord Hardwicke in *Gage v. Bulkeley*, Ridgeway (Temp. Hardwicke), 278.

³ PAWNEE'S DUTY TO ACCOUNT, AND RIGHT TO USE THE PAWN.—It is a Common Law duty of the pawnee to render a due account of all the income, profits, and advantages derived by him from the pledge, in all cases where such an account is within the scope of the bailment. If the pawn consists of cows, horses, or other cattle, the profits of their labour are to be accounted for, if within the contemplation of the parties. The pawnee is at liberty to charge all the necessary costs and expenses to which he has been put, and to deduct them from the income or profits. If he has sold the pledge, he is bound to account for the proceeds, and to pay over to the pawnor the surplus beyond his debt or other demand, and the necessary expenses and charges. (*Story on Bailments*, s. 343.)

USE OF PAWN.—Whether the pawnee is or is not entitled to use the pawn, must necessarily depend in great measure upon the nature of the thing pledged. Mr. Justice Story deduces from the Common Law authorities the following propositions: viz.—(1) If the pawn is of such a nature that the due preservation of it requires some use, such use is not merely justifiable, but is indispensable to the faithful discharge of the duty of the pawnee. (2) If the pawn is of such a nature that it will be worse for the use—such, for instance, as the wearing of clothes that are deposited—there the use is prohibited to the pawnee. (3) If the pawn is of such a nature that the keeping is a charge to the pawnee, as if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse, by way of recompense for the keeping. (4) If the use will be beneficial to the pawn, or it is indifferent, there it seems that the pawnee may use it; as if the pawn is of a setting dog, or of books, which will not be injured by a moderate use. (*Treatise on Bailments*, s. 329.) Sir William Jones indeed says, 'If pawns cannot be hurt by being worn, they may be used, but at the peril of the pledgee; as if chains of gold, earrings, or bracelets, be left in pawn with a lady, and she wears them at a public place and be robbed of them, on her return she must make them good.' (*Treatise on Bailments*, p. 81.) But Lord Holt says, 'The pawn is in the nature of a deposit, and, as such, is not liable to be used.' (*Coggs v. Bernard*, *Smith's L. C.* i. 171.)

another that which he does not himself possess, it follows that the pawnee cannot detain from the real owner, who has the immediate right to possession, an article that he has received in pawn from another.¹ Again, from the fact that by contract the pawnee has received and accepted the article as a bailee, with consideration, he renders himself liable, accordingly, for negligence in its keeping.²

And, lastly, from the fact that the contract of pawn is but a collateral contract, it follows—(1) That a breach of the principal contract is a condition precedent to the right created by the collateral contract, viz., to sell the pledge;³ and (2) That the mere fact of the pawnee

¹ PROPERTY IN THE PAWN.—Under this head two distinct cases may be considered; viz.—(1) Property pledged, in which the pawnor had no property, or that merely of a finder; and (2) Property pledged, in which the pawnor had but a qualified property; his qualified property not extending to the right to pledge, or, if including that right at the date of the pawn, such right has ceased, the article being still in pledge. As to the first, we may remark, that if a person pledges with another, property to which he has no title, and which he has no right to pledge, the real owner may interfere and get possession of the property. (*Cheesman v. Ewall*, 6 Ex. 341.) The Pawnbrokers' Act, 35 & 36 Vic. c. 93, s. 36, makes, as we have already seen (*ante*, p. 494, n. 4), ample provision for the restoration to the true owner of any goods unlawfully pawned; and see the Metropolitan Police Courts Act, 2 & 3 Vic. c. 71, s. 27. In illustration of the case of the pawn of property in which the pawnor has but a qualified property, we may mention—(1) That of a pawn by one of property possessed by him as a factor. The employment of a factor being to sell, it was established law that he could not so pledge the goods entrusted to him to sell, as to give the pawnee any claim as against their owner. See cases cited in *Smith's Mercantile Law*, 6th ed., 140, and *Turner's Contract of Pawn*, p. 46. But now, by the Factors' Act, 4 Geo. IV. c. 83, amended by 6 Geo. IV. c. 94, and by 5 & 6 Vic. c. 39, the law is somewhat altered; by sec. 5 of cap. 94, a pledge by a known agent is made valid as against his principal to the amount of the agent's interest in the goods at the time of their pledge. (2) If the pawnor has only a limited title to the thing, as for life or for years, he may still pawn it to the extent of his title; but when that expires, the pawnee must surrender it to the person who succeeds to the ownership, although the pawnee had no notice that the pawnor was not the absolute owner. (*Hoare v. Parker*, 2 T. R. 376.)

² See Bailees, their responsibility for negligence.

³ When the contract is entered into with a pawnbroker, the statute,

exercising the right of sale created by the collateral contract, does not extinguish his rights created by the principal contract.¹

as we have already seen (*ante*, p. 494, n. 4), determines when the principal contract shall be deemed to be broken, and the right of sale to accrue. When the contract is not with a pawnbroker, and the date for the performance of the principal contract is fixed, there is no difficulty, the pawnee may sell (3 *Salk.* 267); but, even in that case, the pawnee should give notice of his intention to sell. When the contract is not with a pawnbroker, and no date is fixed for the performance of the principal contract, the pawnee has the right, upon request, to insist upon a prompt fulfilment of the engagement, and to require the pawn to be sold on neglect or refusal of the pawnor to comply. (*Story*, s. 308.)

¹ The pawnee can therefore maintain an action upon the principal contract for the difference between the money lent, *plus* the interest, and the sum realised by the sale of the pledge. (*See Story*, s. 314; *Ayliffe*, 21, 22; *South Sea Co. v. Duncomb*, 2 *Str.* 919.) Indeed, the pawnee's possession of the pawn does not suspend his right to proceed against the pawnor for his whole debt or engagement, without selling the pawn, it being a mere collateral security. (*Anon.* 12 *Mod.* 564.)

CHAPTER XVII.

ALIENATION IN TRUST.

WHEN property is placed by its owner (A.), or his agent, in the hands or under the control of another (B.), that it may be kept or used for the benefit of the owner (A.), or some third person or persons (C.) nominated, or to be nominated, by him, or his agent appointed for that purpose, it is said that a *trust is created*. The person so transferring the property, or the control over it, is styled the *creator*, or *declarer of the trust*; the person to whom that property or control is transferred, is styled the *trustee*; and the person for whose benefit it is so transferred, is styled the *beneficiary*. These terms, *creator* or *declarer*, *trustee*, and *beneficiary*, may be regarded as the generic terms used by our law to express the several parties to a *trust*. As indicating, however, these same parties in relation to specific subjects of trust, other terms are employed; *e. g.*, in the case of—

1. Personal property physically transferred to another upon trust, the act, as already explained,¹ is expressed by the generic term *bailment*, the specific term *depositum* being used when the object of the trust is the mere preservation or taking charge of the subject of the trust; and *mandatum*, when something is to be done to or with it by the bailee. The trustee, in the case of a bailment, is ordinarily styled simply bailee,

¹ See *ante*, p. 483.

though sometimes, according to the nature of the bailment, he is distinguished by the terms *depositee* or *mandate*, as the case may be; and the trustor, the *bailor*, *depositor*, or *mandator*.

2. In the case of real property transferred to the trustee by feoffment, the creator of the trust is styled the *feoffor* or *grantor*, the trustee the *feoffee* or *grantee*, and the beneficiary the *cestui qui trust*.

3. In the case of property, whether real or personal, put in trust otherwise than as above, speaking generally, the trustor is styled the *creator of the trust*, the person to whom it is entrusted the *trustee*, and the beneficiary the *cestui qui trust*.

Again, as indicating, not merely the persons, but the instrument or circumstances under which the trust is created, we have still further descriptive titles; *e.g.*—(1) When the trust is created by *last will and testament*, the creator is styled the *testator*, the trustee the *executor* (there may be *trustees eo nomine*, as well as executors), and the beneficiaries the *devisees* or *legatees*. (2) When the property (personalty) of a person deceased without having made a will, is intrusted by the Court for administration, the deceased is styled the *intestate*, the trustee the *administrator*, and the beneficiaries the *distributees*. (3) When the property is vested in trustees, and a power of appointment is given by the creator of the trust to a third person, the trustor is styled the *creator of the trust*, his agent to appoint the *declarer* or *appointor*, and the beneficiaries the *appointees*. (4) When the property put in trust is that of a bankrupt or insolvent, he is termed the *debtor*, *bankrupt*, or *insolvent*, the fiduciary the *trustee*, and the beneficiaries the *creditors*. (5) When the pro-

perty to be administered is that of a lunatic, so found by inquisition, the fiduciary is styled the *committee*; and (6) When it is that of a felon, the fiduciary is styled the *administrator* or *curator*.¹ Under whatever circumstances the relation of fiduciary and beneficiary is created, and by what names soever the respective parties are designated, the legal relation is essentially the same, and the rights and duties of the parties in the main identical, for common to all is the fact, that the property of one is placed in the hands or under the control of another, to be applied by him for the benefit of someone other than himself. I propose, therefore, to consider the principles common to fiduciary relationships in general, under the head of 'Alienation in trust.' Under the titles 'Bankrupt,' 'Bailee,' 'Succession,' &c., reference is made to specific fiduciaries.

Speaking generally, it may be said, that property of every description, and wherever² situated, may be alienated in trust,³ provided the purposes of the trust are not unlawful.

¹ See 33 & 34 Vic. c. 23.

² For when the property is out of the jurisdiction, provided the trustee is within it, as the Court acts *in personam*, it will enforce the trust, even in respect of real estate, to the extent of its ability to control the trustee; *e. g.*, it will decree an account of the rents and profits. (*Penn v. Baltimore, W. & T. L. C.* ii. 923; *ante*, p. 241, n. 1.)

³ Speaking generally, all persons who can hold and dispose of property, can impress a trust upon it. And all persons not disqualified from holding property, may be appointed trustees of it. Though an infant should not be appointed a trustee, it not unfrequently happens that trust property devolves upon one. The inconvenience attending such occurrence has, however, been almost entirely removed by the Trustee Acts, 13 & 14 Vic. c. 60 (1850) and 15 & 16 Vic. c. 55 (1852). As, by 33 & 34 Vic. c. 14, aliens are empowered to hold real estates beneficially, it would seem that there can be now no objection to their being appointed trustees. The property held by a bankrupt in trust is, as we have seen (*ante*, p. 263), expressly exempted from the operation of the Act, which vests all his other property in his assignee. But, though the person originally creating the trust may practically appoint whomsoever he may think fit, when the right of nomination is

When, among other things, we consider—(1) that the rights and duties attached to fiduciary as distinguished from absolute dominium are widely different, and necessarily regulated by the nature of the particular trust; (2) that the fact of possession commonly raises the presumption of ownership, by which presumption the conduct of men relatively to each other is largely regulated; (3) that, great as is the distinction between a gift and a trust, yet the bare fact of the voluntary transfer of property without consideration is, under certain circumstances, equally consistent with the notion or presumption of a *gift*, and with that of a *trust*; and (4) that the bare fact of the legal right to *transfer in trust*, would open a wide door for fraud, on the part either of the creator of the trust or the trustee, unless carefully guarded;—we naturally ask, and seek an answer to the following questions:—

1. Under what circumstances, if any, does the law refuse to allow a trust to be impressed upon property (1) for the benefit of the creator, (2) for the benefit of another or others?

2. Under what circumstances, if any, does the law itself impress a trust upon property, independently of its owner, (1) for the benefit of the owner, (2) for the benefit of another or others?

3. By what evidence is the fact of a trust having been created required to be, or may it be established?

4. What estate is possessed by the trustee in the subject of the trust, (1) as to quality, (2) as to quantity?

granted to another, or devolves upon the Court, it should not, except under peculiar circumstances, be exercised in favour of a near relative of the cestui qui trust. (*Wilding v. Bolder*, 21 Bea. 222.)

5. What are the rights and duties of the trustee?

6. What are the rights and duties of the beneficiary?

I propose to answer the first question under the title, '*Restrictions upon alienation in trust.*' The answer to the second question will be found in sections 3 and 4 of the title, '*Evidence of trust.*'

Restrictions upon Alienation in Trust.—The restrictions upon alienation in trust come under one of two heads, viz.,—as being contrary to the public policy, or as being in fraud of some person, or persons, whose interest in the property put in trust, is thereby injuriously affected. As contrary to public policy, we may mention trusts in violation of the Mortmain Acts¹ and trusts in consideration of future illicit cohabitation, &c.

As instances of trusts in fraud of the rights of others, we have trusts of property made to defeat the rights of creditors, trusts in fraud of the marital rights of a husband, &c.

Trusts in Fraud of Creditors.—A debtor cannot vest his property in one of his creditors for the purpose of hindering and delaying his other creditors, and compelling them to come to terms; for such a deed is fraudulent and void.²

In Appendix A. we have traced the history of the struggle to emancipate realty from its feudal bondage, and in so doing have reviewed, as far as our limits permit, the objects and effect of the Statute of Uses, which had sole reference to realty. By 3 Hen. VII. c. 4, 'all deeds of gift of goods and chattels made or to be made of trust to the use of that person or persons

¹ See '*Mortmain Acts,*' *post.*

² *Smith v. Hurst*, 10 Hare, 30; and see Bankruptcy Act, 1869, sec. 91.

that made the same deed of gift be void and of none effect.' By 13 Eliz. c. 5, voluntary deeds of assignment of real or personal property are declared void as against creditors to whom the grantor is indebted at the date of the assignment. By 27 Eliz. c. 4, voluntary deeds are declared void as against *bond fide* purchasers; and by 17 & 18 Vic. c. 36 (1854), amended by 29 & 30 Vic. c. 96, entitled 'An Act for Preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels,'—after declaring that, 'Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances, and possessed of property; and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors,' it is enacted :—

Sec. 1. 'Every bill of sale¹ of personal chattels, made

¹ 'In construing this Act the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such constructions; (that is to say,)

'The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt; but shall not include the following documents, that is to say, assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers or assignments of any ship or vessel, or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts or at sea; bills of lading; India warrants; warehouse-keepers certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

'The expression "personal chattels" shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery;

after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale (in like manner as a warrant of attorney, in any personal action given by a trader, is now

and shall not include chattel interests in real estate, nor shares or interests in the stocks, funds, or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale:

'Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.'

by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity, authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in, or right to, the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditor, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be.'

Sec. 2. 'If such bill of sale shall be made or given, subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this Act, be taken as part of such bill of sale, and shall be written on the same paper or parchment

misapplied by a solicitor to whom the trustee handed it to invest.¹

Mixing.—Though it is held that a trustee is not expected to take more care of the trust property than he does of his own, he is required to keep it separate and distinct from his own, in order to prevent the possibility of its being affected by his personal embarrassment, as in the case of his bankruptcy, or a right of set-off against him; hence, if upon the failure of his banker, it is found that the trust-money has been paid to his own credit, or mixed with his own monies, instead of being paid into a separate account to the credit of the trust, he will be held personally liable to refund it.²

Reduction into Possession.—When the trust funds consist, in whole or in part, of *choses in action*, the trustee should reduce such *choses in action* into possession, if so required by the trust instrument.³

Conversion.—He must *realise* and *convert* property, which is not invested in such securities as the trust authorizes, within a year from the testator's death, and he is allowed that time for the purpose even where the will directs him to do so immediately after the testator's death.⁴

Accounts.—He must keep proper accounts, and be constantly ready to furnish them, together with all information relating to the trust property, when properly called upon; for, if he neglects, and is compelled by suit to do so, he will be visited with the costs of such suit.⁵ In taking accounts, however, against a

¹ *Bostock v. Floyer*, 35 Beav. 603.

² See *Massey v. Banner*, 1 J. & W. 241.

³ *Wiles v. Gresham*, 2 Drew, 258.

⁴ *Sculthorpe v. Tipper*, L. R. 13 Eq. 232. See 'Conversion,' *post*.

⁵ *Pearse v. Green*, 1 J. & W. 135; *Ottley v. Gilby*, 8 Bea. 602.

trustee, when it is sought to make him personally liable, the Court will consider his *good faith*, and will make every fair allowance in his favour.¹

Indemnity and Reimbursement.—By 22 & 23 Vic. c. 35, s. 31,² every trust instrument is to be deemed to contain clauses for the indemnity and reimbursement of the trustees; but such clauses afford no security to a trustee neglecting to take the necessary steps to secure the trust fund.³ A trustee may, however, be made irresponsible—*e. g.*, even for permitting a co-trustee to receive the funds, and omitting to see to their due application—by a *special indemnity clause*.⁴

Suspension of Powers.—The institution of a suit for the execution of the trust suspends, *ipso facto*, the trustee's powers; he should consequently abstain from further acting in relation to the trust without the instructions or sanction of the Court.⁵

¹ *McDonnell v. White*, 11 H. L. Ca. 570.

² Every deed, will, or other instrument creating a trust either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; *i. e.*—‘That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such money, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity; and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person, with whom any trust monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument.’

³ *Dix v. Burford*, 19 Bea. 409.

⁴ *Wilkins v. Hogg*, 3 Giff. 116.

⁵ See *Walker v. Smalwood*, Amb. 676.

Release.—When his duties are at an end, and his accounts rendered, the trustee is entitled to his release, and he may refuse to pay over the trust funds without a full discharge.¹

See 30 & 31 Vic. c. 132, entitled ‘An Act to remove doubts as to the power of trustees, executors, and administrators, to invest trust funds in certain securities, and to declare and amend the law relating to such investments’; 32 & 33 Vic. c. 46, entitled ‘An Act to abolish the distinction as to priority of payment which now exists between the specialty and simple contract debts of deceased persons.’

The Rights and Duties of the Beneficiary.—As principal, the *beneficiary* or *cestui que trust* is entitled to the enjoyment of the fruits of the trust; he may, by the instrumentality of the Court, compel his agent, the trustee, to perform the duties of the trust.² It is his duty, the trust having been faithfully executed, to release the trustee.

¹ *Re Wright*, 3 K. & J. 421.

² *Foley v. Burnell*, 1 B. O. C. 274.

CHAPTER XVIII.

SUCCESSION.

THE last subject to which our attention is naturally directed in the consideration of Private Law, is that of the succession to the property of the deceased.

Though the right to alienate *inter vivos* is an admittedly necessary incident of that *dominium* enjoyed by the subject, which is styled *absolute*, it is obvious that such right is rarely or never exercised in more than a limited degree. It may be laid down as a general proposition that no one, during his life, voluntarily denudes himself absolutely. It necessarily follows that, at the date of his death, he is possessed of property. What, then, becomes of such property? We answer that, subject to certain restrictions, the law permits him, during his life, to make such disposition of his property, to take effect upon his death, as he may think fit; but that, on the other hand, he is under no legal duty so to do. That being the case, in order to prevent the undisposed of property of one deceased from returning, by the fact of his death, to the region of *extra dominium*, and thus becoming, as *bona vacantia*, the prey of the first who may lay his hands upon it—a state of things utterly inconsistent with the notion of political and civil union—the State, on such event, asserts its *sovereign dominium*, practically declaring the vacated property to belong absolutely to itself. Having regard

however—it is to be presumed, amongst other reasons—to the fact that the intestacy may have been the result of what, in common parlance, would be termed an accident—as, for example, the death having occurred before it was apprehended, and consequently before the steps were taken and provision made, that under other circumstances would have been taken to dispose of the property for the benefit of the relatives of the deceased, the sovereignty does not assert its title in the first instance. It postpones its own claim to rights that it has itself been pleased to confer upon others, viz., the respective members of the family of the deceased.

We should here observe that the law has drawn a broad distinction between real and personal property. In the case of the realty of the deceased, the sovereignty grants it as an entirety to one individual, except in the case of females, to be hereafter noticed; whereas, in the case of his personal property, it is, with certain exceptions, divided between given members of the family. We have, therefore, to ascertain, first, in the case of realty, the persons thus favoured by the law, and the order in which they stand entitled to inherit; and secondly, in the case of personalty, not merely the order of precedence, but the share to which each is entitled.

Descent of Realty.¹—The descent of land² is deter-

¹ The reader is referred to the Tabular Analysis, Table XIII., by the aid of which he will be able readily to determine the person or persons entitled as heir, whether under the Old or New Canons, by simply following the numbers in the appropriate Table; for example, he has simply to look for No. 1, and ascertain if that person exists, for, if so, he is the heir. If not, does No. 2? and so on. Of course, in the case of either sons, daughters, brothers, or sisters, the Canons must be consulted as to their priority or equality.

² The word 'land,' as used in 3 & 4 Will. IV. c. 106, 'shall extend to manors, advowsons, messuages, and all other hereditaments, whether

mined by what are styled the *Canons of Inheritance*. There are still in force two distinct and different codes of inheritance, respectively termed the *Old Canons*¹ and the *New Canons*. The New Canons were enacted by the 3 & 4 Will. IV. c. 106 (1833), and amended by the 22 & 23 Vic. c. 35, s. 19. They are :²—

1. Inheritance shall lineally descend to the issue of the person who last died entitled³ *in infinitum*.

corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the Common Law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency.' (sec. 1.)

¹ The Old Canons, which apply in the cases of ancestors who died before 1st January, 1834, are :—

1. Inheritance shall lineally descend to the issue of the person who last died actually seized *in infinitum*, but shall never lineally ascend.

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

5. On the failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.

6. The collateral heir of the person last seized must be his next collateral kinsman of the whole blood.

7. In collateral inheritances the male stock shall be preferred to the female; that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the females, however near, unless where the lands have in fact descended from the females.

² *I.e.*, as formulated in Sugden's V. & P. (10th ed.) ii. 238.

³ 'THE PERSON LAST ENTITLED TO LAND, shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof.' (sec. 1.) In every case descent shall be traced from the *purchaser*.

'THE PURCHASER' shall mean the person who last acquired the land otherwise than by *descent*, or than by any *escheat*, *partition*, or *inclosure*,

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

5. On failure of lineal descendants, or issue of the person last entitled, the inheritance shall ascend and descend to the lineal ancestors, and to the collateral relations of the purchaser.

6. The nearest lineal ancestor shall be the heir of the purchaser, in preference to any of the descendants of such lineal ancestor, and to more remote lineal ancestors and their descendants, other than himself; and the descendants of every such lineal ancestor shall succeed next after or in default of him, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue; and, subject to this rule and to the next, the descent to collaterals shall be subject to the second, third, and fourth canons.

7. As between collaterals of a purchaser, a relation

by the effect of which the land shall have become part of, or descendible in the same manner as other land acquired by descent (sec. 1); and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person *last entitled* to the land shall, for the purposes of this Act, be considered to have been the *purchaser* thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the *purchaser*, unless it shall be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited shall, in every case, be considered to have been the *purchaser*, unless it shall be proved that he inherited the same. (sec. 2.)

of the *half blood* shall succeed next after any relation in the same degree of the *whole blood* and his issue, where the common ancestor shall be a male; and next after the common ancestor where such common ancestor shall be a female. So that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father, and their issue; and the brother of the half blood on the part of the mother shall inherit next after the mother. The collaterals of the half blood of a person last entitled, who was not a purchaser, will take in a course of descent from the purchaser of whose whole blood they are, by force of the direction that in every case the descent shall be traced from the purchaser.

8. In lineal ascending and in collateral inheritances, the male stock shall be preferred to the female; that is, the male ancestors and kindred derived from their blood, however remote, shall be admitted before female ancestors and kindred derived from their blood, however near,¹ unless where the lands have, in fact, descended from a female.

9. 'Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor; then, and in every such case, the land shall descend, and

¹ Therefore, under the new law, none of the maternal ancestors of the person from whom the descent is to be traced—viz., the purchaser—nor any of their descendants are capable of inheriting, until all his paternal ancestors and their descendants shall have failed; and also no female paternal ancestor of such person, nor any of her descendants, is or are capable of inheriting, until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, is or are capable of inheriting, until all his male maternal ancestors and their descendants have failed. (*Sug. V. § P. ii. 238, 10th ed.*)

the descent shall thenceforth be traced from the person last entitled to the land, as if he had been the purchaser thereof.¹

Descent and Distribution of Personality.²—The descent and distribution of the personalty of a *deceased intestate* is regulated by the 22 & 23 Car. II. c. 10³ (1670), the effect of which will be readily appreciated by reference to Tables XIV. and XV., and the following propositions based by Mr. Watkins⁴ on the statute and decided cases :—

1. If the intestate leaves a widow and children, the widow takes one-third, and the children take the remaining two-thirds equally.

2. If he leaves a widow and no children, she takes a moiety, and the next of kin the other moiety, as mentioned hereafter.

3. If he leaves no widow, the entirety is distributable among his children equally; and if he leaves but one child, it devolves upon such only child.

4. If some of the children of the intestate die in his lifetime leaving children, such children or their lineal representatives *in infinitum* take *per stirpes* equally.

5. If all the children of the intestate die during his lifetime, leaving children, such children—or if all of such children die in the lifetime of the intestate, leaving children, then all such grand-children—take equally *per capita*, claiming in their own right, and not by representation.⁵

¹ 22 & 23 Vic. c. 35, s. 19.

² See Tabular Analysis, Table XIV.

³ This statute does not extend to the estate of a married woman; so that the husband takes the whole of her personal effects, he being entitled by the Common Law to administer to his deceased wife. (*Johns v. Rowe*, Cro. Car. 106; *Elliot v. Collier*, 3 Atk. 526.)

⁴ Watkins on Conveyancing, p. 432.

⁵ But see *Re Ross's Trusts*, L. R. 13 Eq. 286.

6. If all the children of the intestate die, after his decease, but before distribution¹ is made, their shares vest at the decease of the intestate, and their lineal representatives *in infinitum* take *per stirpes* equally.

7. Where distribution is made among the children of the intestate, such children—excepting the heir-at-law—must bring into *hotchpot*² any advancement made by the intestate in his lifetime.

8. The lineal descendants of the intestate *in infinitum* are preferred to all ascendants or collaterals.

9. If the intestate leaves neither widow, child, nor descendant of child, the next of kin are entitled,—*i.e.*, the father, if living, takes the whole; but if dead, the mother, brothers, and sisters of the intestate take

¹ Distribution is not to be made until twelve months after the decease of the intestate.

² *HOTCHPOT* (*haché-en-poche*)—‘a confused mingling of divers things, a blending or mixing of lands and chattels, answering in some respects to the *collatio bonorum* of the civil law. (See *Litt. s.* 267.)

‘As to *lands*, it only applies to such as are given in frank-marriage, thus: if one daughter have an estate given with her in frank-marriage by her ancestor, then, if lands descend from the same ancestor to her and her sisters in fee simple (not in fee-tail), she or her heirs shall have no share in them, unless they will agree to divide the lands so given in frank-marriage, in equal proportions with the rest of the lands descending, *i.e.*, bringing her lands so given into hotchpot.

‘As to *personalty*. The Statute of Distribution intended children to take equal shares of the goods and chattels of their intestate ancestor, and it considers that there may be some of the children who have previously received a portion or advancement, but not so much as to make up their full share; in that case such child so advanced but in part is allowed so much more out of the intestate’s personal estate as will suffice to make his share equal to that of the other children. The Act takes nothing away that has been given to any of the children, however unequal that may have been. How much soever that may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he please, keep it all; if he be not content, but would have more, then he must bring into hotchpot what he has before received. This principle is based upon the equitable doctrine of equality, for it is perfectly coincident with that conduct which a good and just parent would pursue towards all his children.’—*Wharton’s Law Lexicon*.

equally, the children of deceased brothers and sisters standing *in loco parentis*.¹

10. If there be neither brother nor sister, nor the child of a brother or sister, the mother takes the whole. But a mother-in-law takes nothing.

11. If there be no mother, the brothers and sisters take equally, and the children of the deceased brother or sister stand *in loco parentis*.

12. If there be neither mother, brother, sister, nor children representing a brother or sister, distribution is made without preference among those who are then next in degree of kindred to the intestate, according to the Civil Law.²

¹ But this right of representation, being among collaterals, extends no farther than to children of the brothers or sisters of the intestate. (*Pett's Case*, 1 P. Wms. 27.) Thus, a sister's son excludes a brother's grandson (*Pett's Case*), and an uncle the son of a deceased aunt (*Bowers v. Littlewood*, 1 P. Wms. 594).

² *Mentney v. Petty*, Prec. Cha. 593.

NEXT OF KIN — CONSANGUINITY. — Consanguinity, or kindred, is defined to be '*Vinculum personarum ab eodem stipite descendit*', the connection or relation of persons descended from the same stock or common ancestor. Consanguinity is either *lineal* or *collateral*. Lineal consanguinity is that which subsists between all who are in the direct line of either *ascent* or *descent*, as between the *Propositus*—*i.e.*, the person whose next of kin are sought, as indicated in Table XV.—and his son, grandson, great-grandson, and so on downwards in the direct descending line, or between him, his father, grandfather, great-grandfather, and so on upwards in the direct ascending line. Each generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards, as indicated by the numbers in the Table; *e.g.*, the father or son is related to the *Propositus* in the first degree. Collateral kindred, like lineal, are descendants of a common ancestor, but are not descendants the one of the other. As many ancestors as a man has, so many common stocks has he, from which collateral kinsmen may be derived. The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, so as to be entitled on distribution, is to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or, in other words, to take the sum of the degrees in both lines to the common ancestor. In Table XV. the degrees are computed as far as the sixth. By reference

13. Paternal and maternal relations in equal degree take together.¹

Personal Disposition.—Having indicated the destiny of property, whether real or personal, when left to the disposition of the law, we come to the consideration of the dispositions that may be made by the proprietor during his life, but which are not to take effect till after his death; viz., *donationes mortis causæ*, and dispositions by the *last will and testament* of the deceased.

Donationes Mortis Causæ.—A *donatio mortis causæ* is a gift of personal property made by one who apprehends that he is in peril of death, evidenced by a

to that Table and observance of this rule, it will be seen that the Propositus and his brother or sister are thus related in the second; he and his uncle or aunt, or he and his nephew or niece, in the third; he and his great-uncle or great-aunt, or he and his cousin-german, or he and the son or daughter of his nephew, in the fourth degree, and so on. Thus, we observe that kindred are often distant from the Propositus by an equal number of degrees, although relations to him of different denominations. The preference of males to females, which exists in the succession to realty, has never been applied to rights respecting personal estate. See however, as to preference in grants of administration, Williams' Executors, i. p. 409 *et seq.*

By reference to Table XIV., it will be seen that, by the Statute of Distributions, the widow of a deceased intestate, all relations within the first and second, together with some within the third degree, and lineal descendants *ad infinitum*, are specified, and their rights respecting his personalty determined. The *next of kin* referred to in Table XIV. are therefore (1) Uncles or aunts, if any, or (2) Collaterals in the fourth or any later degree; the existing members of any one degree taking equally, and to the exclusion of those of a more remote degree.

CIVIL LAW ORDER OF SUCCESSION.—'If there be neither mother, brother, sister, nor children representing a brother or sister, the grandfather, or, if he is dead, the grandmother (*Blackborough v. Davis*, 1 P. Wms. 41) takes; they being preferred before the children of a deceased brother or sister claiming in their own right, and not as representatives.'

'Next the grandfather, the great grandfather, or, if he is dead, the great-grandmother, uncles, aunts, nephews, and nieces, claiming in their own right, take together, as being in equal degree.'

'If there be none entitled in this degree, then the great-great-grandfather, or, if he is dead, the great-great-grandmother, great-uncle, first cousin (or uncle's son), and great nephew (or brother's grandson) take together, being equal in degree.' (*Watkins*, p. 434.)

¹ Moor v. Barham, cited in *Blackborough v. Davis*, 1 P. Wms. 53.

utor, a will is null and void." However, this strictness has long ceased to exist, and, even by the old authorities above-mentioned, an instrument which would have amounted to a testament if an executor had been nominated, was recognized as obligatory on him who had the administration of the goods of the deceased under the appellation of a *codicil*; which is accordingly defined by Swinburne and Godolphin to be "*the just sentence of our will touching that which we would have done after our death, without the appointing of an executor,*" and hence a codicil was called "*an unsolemn last will.*" It was termed *codicil* (*codicillus*) as a diminutive of a testament (*codex*). But, although it appears that *codicils* might be made by those who died without testaments, yet the more frequent use of a codicil was, as an addition made by the testator, and annexed to and to be taken as part of a testament, being for its explanation or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator; in which sense the term codicil is applied in modern acceptance. A codicil, in this latter sense of it, is part of the will, all making but one testament.'

The general Wills Act now in force is 1 Vic. c. 26. It enacts, 'That it shall be lawful for every person¹ to

¹ The so-called will of an idiot is, of course, void. (*Dyer*, 143, b.) Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power. (*See Swinb. Part ii.*, ss. 5, 6.) A person blind, deaf, and dumb from nativity, is incapable of making a will. (*Co. Litt.* 42, b.) A will made by a lunatic during a lucid interval is good. 'If,' said Sir W. Wynn, 'you can establish that the party afflicted habitually by a malady of the mind, has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this—it inverts the order of proof, and of presumption; for until proof of habitual insanity is made, the pre-

devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate, and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law or customary heir of him, or if he became entitled by descent of his ancestor, or upon his executor or administrator, &c. &c.' (s. 3.) This clause must be read in conjunction with 39 & 40 Geo. III. c. 98, s. 1 (1800),¹ which enacts, that 'No person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term

sumption is, that the party agent, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it.' (*Cartwright v. Cartwright*, 1 *Philim.* 100.) See *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Broughton v. Knight*, L. R. 3 P. & D. 64.

¹ **THELLUSON'S CASE; RULE AGAINST PERPETUITIES.**—This Act was occasioned by the extraordinary will of the late Mr. Thelluson, who directed the income of his property to be accumulated during the lives of all his children who were living at the time of his death for the benefit of some future descendants to be living at the decease of the survivor. [See *Mr. Butler's Note (t) to Fearn's Cont. Rem.* 433, 9th ed.] This may be further explained by saying that the House of Lords, in the case of *Cadell v. Palmer* (7 *Bl.* 202), established what is known as the rule against perpetuities, which is that, in every case of an executory limitation, the property must vest within a life or lives in being, and twenty-one years, to which is also added, when necessary, the period of gestation. (See *Tudor's L. C.* p. 360.) Mr. Jarman, in his *Treatise on Wills*, p. 229, says, 'It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child *en ventre sa mère* is considered as a life in being.' The act is expressly declared not to extend to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of timber or wood—s. 2. (See *Griffiths v. Fere*, *Tudor's L. C.* p. 430.)

than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of such grantor, settlor, deviser, or testator; or during the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mère*, at the time of the death of such grantor, deviser, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, &c.’

The Wills Act further enacts, that no will made by any person under the age of twenty-one years shall be valid. (sec. 7.) That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.¹ (s. 8.) That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned;² that is to say, it shall be signed at the foot

¹ The meaning of this section is, that a married woman shall not make a will disposing of any property, except such property as she was competent to dispose of before the passing of the Act. (*Wood, V.C.*, in *Bernard v. Winshull, Johns*, 297; see ‘*Husband and Wife*.’)

² To this general proposition there are the following exceptions:—‘That any soldier, living in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.’ (sec. 11.) That is, by the expression of his will in an informal writing, or even by his verbal as distinguished from the written declaration of his will. Verbal wills, styled *nuncupative wills*, depend merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. Except in the case of soldiers and sailors situated as above described, the Statute of Frauds

or end thereof by the testator, or by some other person in his presence and by his direction ;¹ and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. (s. 9.) That every will executed in manner hereinbefore required shall be valid without any other publication thereof. (s. 13.) That if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent² to be admit-

placed so many restrictions upon *nuncupative wills* as practically to abolish them ; and, by the 12th sec. of the Wills Act, it is provided that the Act is not to affect the provisions of 11 Geo. IV. and 1 Will. IV. c. 20, respecting wills of petty officers and seamen and mariners.

¹ By 15 Vic. c. 24, it is further enacted, that 'Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act ; if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause, or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature ; and the enumeration of the above circumstances shall not restrict the generality of the above enactment ; but no signature under the said Act, or this Act, shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

² See sec. 15, and Jarman on Wills, pp. 104—106.

ted a witness to prove the execution thereof, such will shall not on that account be invalid. (s. 14.) That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate—other than and except charges and directions for the payment of any debt or debts—shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. (s. 15.) That every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment,¹ when the real or personal estate thereby

¹ POWERS.—‘A power is an authority which one man gives to another, to act for him; also, it is sometimes a reservation which a man makes in a conveyance for himself to do some act, viz., as to make leases or the like. (*Lill. Practical Register*, ii. 216.)

‘Powers are either Common Law authorities, declarations, or directions, operating only on the conscience of the persons in whom the legal interest is vested; or declarations or directions deriving their effect from the Statute of Uses.’ (*Sugden on Powers*, p. 1.) A power given by a will to A., an executor, to sell an estate, to whom no estate is devised, and a power given by an Act of Parliament to sell estates, as in the instances of the Land Tax Redemption Acts, are both Common Law authorities. The estate passes by force of the will or Act of Parliament, and the person who executes the power merely nominates the party to take the estate. A power of attorney is also a Common Law authority. A power to dispose of an estate or sum of money of which the legal estate is vested in another, is a power of the second sort. The legal interest is not divested by the execution of the power, but equity will compel the person seised of it to clothe the estate created with the legal right. Powers deriving

appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions. (s. 18.) That

their effect from the Statute of Uses are either given to a person who has an estate limited to him by the deed creating the power, or who had an estate in the land at the time of the execution of the deed, or to a stranger to whom no estate is given, but the power is to be exercised for his own benefit, or to a mere stranger to whom no estate is given, and the power is for the benefit of others. Powers are either (1) *Collateral*, which are given to strangers, i.e., to persons who have neither a present nor future estate or interest in the land. These are also called *simply collateral*, or *powers not coupled with an interest*, or *powers not being interests*. These terms have been adopted to obviate the confusion arising from the circumstance that powers in gross have been by many called *powers collateral*. (See *Savile v. Blackett*, 1 P. Wms. 777.) (2) *Relating to the land*, which are either—(i.) *Appendant* or *appurtenant*, because they strictly depend upon the estate limited to the person to whom they are given. Thus, where an estate for life is limited to a man, with a power to grant leases in possession, a lease granted under the power may operate wholly out of the life estate of the party executing it, and must in every case have its operation out of his estate during his life. Such an estate must be created, which will attach on an interest actually vested in himself; or (ii.) *In gross*, which are given to a person who had an interest in the estate at the time of the execution of the deed creating the power, or to whom an estate is given by the deed, but which enable him to create such estates only as will not attach on the interest limited to him.

An important distinction is established between *general* and *particular* powers. By a general power, we understand a right to appoint to whomsoever the donee pleases. By a particular power, it is meant that the donee is restricted to some objects designated in the deed creating the power. (*Wharton's L. L.*)

Great care should be taken in the creation of powers, as the appointor can only act according to the precise authority given; e.g., If a power is given to *husband and wife*, the *survivor* cannot appoint; if a power is given to A. to appoint by *deed*, he cannot appoint by *will*. If the power is simply to designate a person or the like, it should not be clogged with many ceremonies; but if collusion or influence is feared, it is prudent to throw certain ceremonies in the way, e.g., to require three or four witnesses, '*not being menial servants*.' Again, it should be considered whether the estates to be taken under the power, when executed, are to be estates in *possession*, or mere *trusts*; if the former, the estates should be conveyed by the deed creating such power to the trustees and their heirs, to such uses as A. shall appoint; and then, on the appointment, the statute will execute the use; if the latter, the legal estate should be placed in the trustees, as to A. and his heirs to the use of B. and C. (the trustees) and their heirs, to and upon such trusts, and for such estate or estates, ends, intents, and purposes as

no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. (s. 20.) That no alteration in a will shall have any effect unless executed as a will. (s. 21.) That no will revoked shall be revived otherwise than by re-execution or a codicil to revive it. (s. 22.) That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.¹ (s. 24.) And, briefly, it is further provided that a

D. shall appoint, as the use would then be executed in the trustees, and the estates taken under the appointment would be trust estates only. (*See Watkins*, p. 258 *et seq.*)

See 1 Vic. c. 26, s. 10; 22 & 23 Vic. c. 35, ss. 12—18. As to excessive execution of powers, see *Alexander v. Alexander*, Tudor's L. C. 330; their extinguishment and suspension, *Edwards v. Slater*, Tudor's L. C. 305.

By 37 & 38 Vic. c. 37, it is enacted (sec. 1), 'That no appointment which, from and after the passing of this Act, shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded; but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power.'

Sec. 2. 'Provided always, and be it enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.'

¹ This section being read in connection with the third section, it is clear that a general devise, whether of the real or the personal property or both of the testator, passes all such property possessed by the testa-

devise is not to be rendered inoperative by any subsequent conveyance or act. (s. 23.) That a residuary devise shall include estates comprised in lapsed¹ and void devises. (s. 25.) That a general devise² of the testator's lands shall include copyhold and leasehold as well as freehold lands. (s. 26.) That a general gift shall include estates over which the testator has a general power of appointment. (s. 27.) That a devise without any words of limitation shall be construed to pass the fee. (s. 28.) That the words '*die without issue*,' or '*die without leaving issue*,' shall be construed to mean, '*die without issue living at the death*.'³ (s. 29.) That no devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest. (s. 30.) That trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, shall take the fee. (s. 31.) That devises of estates tail shall not lapse (s. 32); and that gifts to children or other issue, who leave issue living at the testator's death, shall not lapse. (s. 33.)

Conversion—Actual and Constructive.—It is scarcely necessary to say that a proprietor may sell his land, and thus convert it into money—*i. e.*, into personalty—or that he may sell his personalty, of whatever description, and, by investing the proceeds in land, thus convert his *personalty* into *realty*. What he can him-

self at the date of his death, though a part or the whole may not have been possessed by him at the date of his will; *i. e.*, as the Act says, 'Unless a contrary intention shall appear in the will'; *e. g.*, a general devise of lands in a particular place will, of course, not include lands subsequently purchased, where the will disposes of the latter. (*See Re Farrer*, 8 *Ir. Com. L. Rep.* 370 [1869].)

¹ See *Elliot v. Davenport*, Tudor's L. C. p. 873; and '*Incomplete Dispositions*,' *post*, p. 544.

² As to where trust and mortgage estates are comprised in a general devise, see *Lord Braybroke v. Inskip*, Tudor's L. C. p. 876.

³ See *Forth v. Chapman*, Tudor's L. C. p. 593. ¶

self do in this respect, he may direct his executors to do after his decease. If he does so, he in fact dies possessed of one class of property; but, in contemplation of the law, a constructive conversion has been effected by the direction to his executor, and, as a consequence, the rights of his legal representatives are seriously affected—are, in fact, totally changed. So, during his life he may, as a consideration for marriage, undertake to lay out so much money in the purchase of land to be settled to the uses of the marriage; in which case, should he contract the marriage in question, but die before he has effected the conversion, a court of equity will direct the conversion to be made in fact as it regards the promise, followed by the marriage, as a constructive conversion, dating from the time when the consideration for the promise—*i. e.*, the fact of the marriage—was given. The principle of equity, as stated by Sir Thomas Sewell,¹ is that ‘Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed² to be converted; and this, in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money be actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the land (pro-

¹ In *Fletcher v. Ashburner*, 1 Bro. C. C. 497. W. & T.’s L. C. i. 826.

² In order to work a constructive conversion, an actual sale or purchase, either *immediately* or *in future*, and either *absolutely* or *contingently*, at a specified time, must be directed expressly or *impliedly*. A mere direction that real estate is to be considered as personal, or *vice versa*, is insufficient; for the law will not allow property to be retained in one shape, and yet to devolve as if it were in another. (*See Johnson v. Arnold*, 1 Ves. 170.)

perty?) or the contracting parties, may make land money or money land.' It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of that character.¹

Having established the facts—(1) That if a proprietor dies, not having made a disposition of his property, his realty will go to his heir, and his personalty as directed by the Statute of Distribution; (2) That he is at liberty to dispose of his property as he may think fit, subject to the restrictions mentioned; (3) That, in making a disposition of his property, he may direct that his realty shall be converted into personalty, or his personalty into realty:—we add, (4), that where property is given upon trust, and the trust fails, either entirely or partially, by reason of the failure of the intended objects or purposes, or some of them, or of the illegality or indefinite nature of the trusts, or some of them, or otherwise; or where the trusts are fully and finally fulfilled, without exhausting all the property out of which they were to be fulfilled, then there is a *resulting trust* of such property, or of so much thereof as remains unexhausted, to the person creating the trust, or to his heir or legal representatives, unless there is sufficient evidence of, or presumption of, a contrary intention.² We now come to the consideration of the consequences of what we may term *defective dispositions*.

¹ Jarman on Wills, p. 549.

² Smith's Manual of Equity, p. 156; and see 'Resulting Trusts,' *ante*, p. 512, *post*, p. 544.

Incomplete Dispositions—Resulting Trust.—By the term *incomplete dispositions*, I intend—(1) a disposition that at its inception does not cover the whole property; or (2) one which, though perfect at its inception, subsequently becomes imperfect by reason of the failure of some one or more of the intended beneficiaries. As an example of the first position, we may offer the following:—A., who is possessed of both real and personal estate, by his will appoints Y. his executor, and directs him, upon his (A.'s) death, to sell, and thus convert his entire property into money, and having thereout paid his funeral expenses and discharged all his just debts, to give to B. £5,000, to C. £2,500, and to D. £1,500. A. dies; Y. realises the property; and, having discharged all the liabilities, viz. £600, has £10,000 in hand. He gives to B., C., and D., respectively, the sum directed, but still has £1,000 in hand. What is he to do with it? There being no residuary devisee, there is of necessity a *resulting trust* to some one. It cannot be to the grantor, for he is dead. It must, therefore, be to one or more of his representatives. Does it go to his *real* or his *personal representative* or representatives, or to both? If to both, in what proportions? It is true, the testator directed his real estate to be converted into personalty, but he did so for a purpose expressly stated, which purpose has been fulfilled; and, being fulfilled, has left a portion of the property undisposed of, in the executor's hands. Upon examining the executor's accounts, we observe that the *realty* produced £6,360, the household furniture, plate, stock in the funds, &c., in fact his *personalty*, £4,240; *i. e.*, the realty produced six-tenths, and the personalty four-tenths of the total amount,—in other words, we may regard £600 as representing the undis-

posed-of realty, and £400, the undisposed-of personalty. Mr. Scott, afterwards Lord Eldon, in his elaborate argument in the leading case upon this point,¹ contended, that the undisposed-of portion which represented the realty, should in equity go to the heir-at-law, and that which represented the undisposed-of personalty should go to the personal representative; and such Lord Chancellor Thurlow held to be the justice of the case, and accordingly established the rule, never since questioned, that 'where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed-of beneficial interest will result to his heir-at-law, although the land may have been actually converted into money.'²

As an example of the second position, we may take the following:—A., who is possessed of landed estate, by his will has appointed Y. his executor, and directed him upon his (A.'s) death to sell, and thus convert his entire property into money; and, having thereout paid his funeral expenses and discharged all his just debts, to give to B. £5,000, to C. £2,500, and to D. £1,500, at the same time appointing B. his residuary legatee. It is obvious that three different cases may arise in the event of A.'s death, there not having been any alteration in his will; viz.—(1) That all three, B., C., and D., may survive him; (2) That some only may do so, say C. and D., in which case B.'s legacy is said to have *lapsed*;³ and (3) That all three may predecease him.

¹ *Ackroyd v. Smithson*, White & Tudor's L. C. i. 872.

² See *Ackroyd v. Smithson*.

³ When A. bequeathed to B. £400, which he owed her, provided he should pay thereout several sums to his children, the rest she freely gives him, and directs her executors to deliver up the security, and not to claim any part of the debt, but to give such release as B., his executors, &c., should require. B. died in the life of A. The legacy was decreed to be a lapsed legacy. (*See Elliot v. Davenport*, Tudor's L. C. p. 803.)

In the first case, no difficulty arises. The case differs from that mentioned in the first illustration, in that the surplus £1,000 goes to the residuary devisee B. In the second case, we have the same facts as in the first illustration, with the addition of £5,000 to be dealt with as there described. But in the third case, the matter is entirely changed; all the beneficiaries having predeceased the testator, the object of the conversion has wholly failed. Consequently, as no conversion has been effected in fact, no constructive conversion is intended by the law; for the doctrine of constructive conversion only applies where an object exists for whose benefit the law intervenes. The testator has in effect died intestate, his realty therefore goes to his heir, his personalty to his next of kin, as directed by law.

In order the more clearly to bring before the mind of the reader what has already been said respecting wills, and to direct his attention to the remaining questions respecting them, that are within the scope of our enquiry, the following forms of wills may be given with advantage; the first being a will of the most simple kind; the second, one of a more elaborate character.

These forms, together with most of the notes thereon, are taken from Hayes & Jarman's Concise Forms of Wills, by Eastwood, see pp. 121 and 229 respectively. A perusal of the second form will suffice to satisfy the reader that, if he requires a complicated will, he will do well not to attempt to make it himself.

FORM I.

[Will giving to one absolutely all the testator's real and personal estate.]

'This is the last will and testament¹ of me, James Smith, of 4, Norland Terrace, Notting Hill, gentleman. I devise and bequeath all the real and personal estate to which I shall be entitled at the time of my decease, unto my dear wife Jané, absolutely; but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively. And I appoint the said Jane sole executrix of this my will, hereby revoking all other testamentary writings. In witness whereof I have hereunder² set my hand, this twenty-second day of December, 1867.

'JAMES SMITH.

'Signed by the said testator, James Smith, as and for his last will and testament, in the presence of us present at the same time, who, at his request, in his sight and presence, and in the presence of each other, have subscribed our names as attesting witnesses,

JAMES BROWN,

'of 24, King Street, Holborn, bootmaker.

'CHARLES JONES,

'of 22, King's Street, Holborn, baker.'

FORM II.

[Will of a married man providing for a wife and his son, an only child.³—Bequest of household effects to wife.—Pecuniary legacy to testator's mother for life, then to his sister absolutely.—Devise of real estates to wife for life.—Remainder to son absolutely, with an executory devise, on his death under age, to wife absolutely.—Power to lease.—Bequest of residuary personal estate to trustees for conversion and investment.—Income to wife for life.—Capital to son, with executory bequest, on his death under age, to wife.—

¹ A 'will' relates properly to real estate; a 'testament' to personalty requiring an executor. 'Will' and 'last will,' are synonymous terms. (*Eastwood*, p. 121.)

² See 1 Vic. c. 26, s. 9, and 15 & 16 Vic. c. 24, s. 1, *ante*, p. 537, n. 1.

³ This precedent should be adopted only in a case where the testator's wife has passed the age of child-bearing. (*Eastwood*, p. 229.)

Provisions for maintenance and advancement of son.—Powers to sell real estate and invest the produce to be held upon the trusts of the personal estate; to postpone the conversion of personal estate; to give receipts; to appoint trustees.—Appointment of executors and guardians.]

'This is the last will and testament of me, James Brown, of Hill House, Dover, Esquire. I bequeath to my trustees and executors, hereinafter named, £100 a-piece, and to my friends George Smith, of Clifton House, St. John's Park, Norwood, Esquire, and Robert Jones, of Bristol House, Lewisham, Esquire, £50 a-piece for a ring, in remembrance of me. And I bequeath to my said trustees the sum of £10,000, upon trust 'to invest' the same in or on the public funds or government 'or real securities in the United Kingdom, or on railway debentures, but on no other security, and to pay the annual income thereof to my mother, Sarah Brown, during her life; and 'after her decease to transfer the principal fund to my sister, Sarah Brown, for her absolute use: and I empower my said trustees or trustee, with the consent in writing of my said mother, to change from time to time the investment of the 'same sum from any of the said funds or securities to any other or 'others of a like nature: and I direct the aforesaid legacies to 'be retained or paid at the end of three calendar months after 'my decease,¹ and the lastly bequeathed legacy to carry interest 'at the rate of four per cent. per annum from my decease.² I 'bequeath all the furniture, plate, linen, china, glass, books, 'prints, pictures, wines, liquors, fuel, consumable provisions, 'and other household effects, of which I shall die possessed, 'unto my dear wife Jane, absolutely. I devise all the real 'estate, of whatsoever tenure and wheresoever situate, including chattels real, to which I shall at my decease be entitled, 'either in possession, reversion, or otherwise, except estates

¹ When no express instructions are given to the trustee as to the securities in or on which he is to invest, he is governed by 22 & 23 Vic. c. 35, s. 32; 23 & 24 Vic. c. 38, s. 12; 30 & 31 Vic. c. 132, s. 1.

² Nothing being directed to the contrary, legacies are payable one year after the testator's death. (*Benson v. Maude*, 6 Madd. 15.) The 'ear is given to the executor to enable him to realise the assets; he 'therefore pay the legacies before the expiration of the year, if he realised. (*Pearson v. Pearson*, 1 Sch. & L. 12.)

As to when interest, and what, is due on legacies, see Eastwood, 30, n. [e].

'vested in me as trustee or mortgagee,' unto my said wife Jane
'and her assigns, for her life, without impeachment of waste, so
'far as I can grant that privilege; and after her decease, unto
'my son and only child, James Hastings Brown, his heirs, exe-
'cutors, administrators, and assigns; but if my said son shall die
'under the age of twenty-one years² without leaving issue,
'then I devise the same real estate and chattels real, unto my
'said wife, her heirs, executors, administrators, and assigns; and
'I empower my said wife during her life, and, after her decease,
'the trustees or trustee for the time being of my will, during
'the minority of my said son, to grant leases³ of my said real
'estate, or any part or parts thereof, for any term or terms of
'years not exceeding twenty-one years in possession, at the
'best rent, without taking any fine or premium, and upon such
'terms in other respects as the lessors or lessor shall think
'reasonable. I bequeath the residue of my personal estate to
'my trustees hereinafter named, upon trust to convert and get
'in the same, and invest the money to arise therefrom in or on
'the public funds, or government or real securities in the
'United Kingdom, but in or on no other investment or security;
'and upon further trust to permit and empower my said

¹ If property was vested in the testator as trustee, jointly with another or others, upon his death the trust vests in the remaining trustee or trustees. If the testator was appointed sole trustee without naming his heir or personal representative, the heir or personal representative does not become a trustee on his death, although the property may vest in the heir or representative. As to vesting orders in the case of lunatic and deceased trustees, &c., see 13 & 14 Vic. c. 60, entitled an 'Act to Consolidate and Amend the Laws relating to the Conveyance and Transfer of Real and Personal Property, vested in Mortgagees and Trustees,' extended by 15 & 16 Vic. c. 55. It is now settled that a general devise will carry estates vested in the testator as trustee or mortgagee, there being no evidence of a contrary intention. (*Bainbridge v. Lord Ashburton*, 2 Y. & C. Ex. 347. See *Eastwood*, p. 292, n. [i].)

² However late in the day a person is born—say at 5 minutes to 12 at night—that day is included in computing the age for testamentary purposes. The law does not in general recognise fractions of days—*Fractionem diei non recipit lex*. (See *Lester v. Garland*, 15 Ves. 248.) But, where several deeds are executed on the same day, they take effect in the order of their delivery. So, an execution issued on the same day as, but after, an act of bankruptcy committed, is overreached by the prior act of bankruptcy. (See *Cases*, *Eastwood*, pp. 234, 235.)

³ See 19 & 20 Vic. c. 120, s. 32. See *Estates*, 'Quantity of interest,' and 'Customary estates.'

'wife to receive the annual income of the said moneys, or the securities whereon the same shall be invested, during her life; and after her death, as to the same moneys and securities and the annual income thenceforth to become due for the same, in trust for my said son, his executors, administrators, and assigns. But if my said son shall die under the age of twenty-one years without leaving issue, then in trust for my said wife, her executors, administrators, and assigns; and I empower my said trustees or trustee,¹ with the consent in writing of my said wife, whether covert or sole; and after her decease, and during the minority of my said son, in the discretion of my said trustees or trustee, to change from time to time the investment of the last-mentioned moneys from any of the said funds or securities to any other or others of the like nature. I further empower my said trustees or trustee, after the decease of my said wife, to apply such part as they or he shall deem expedient of the income of the real and personal property hereinbefore devised and bequeathed, to or in trust for my said son, in or towards his maintenance and education, or otherwise for his benefit during his minority; and I direct my said trustees or trustee to accumulate, during his minority, the unapplied income by investing the same, with power to vary the investment as aforesaid, and to add the accumulations thereof to the capital of the personal property so bequeathed. I further empower my said trustees or trustee, with the consent in writing of my said wife, whether sole or covert, during her life; and after her decease, and during the minority of my said son, in the discretion of my said trustees or trustee, to apply any part or parts of the personal property so bequeathed as last aforesaid, or of the said accumulations, not exceeding in the whole the sum of £5,000, in or towards the advancement² or preferment

¹ See 23 & 24 Vic. c. 145, s. 25, as to trustee's power to vary securities when no express authority is given by the testator.

² A power of advancement under a will for setting up the children of the testator in business, does not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts. But the share may be advanced to set up the daughter in business, her husband covenanting that it shall be for her separate use. (*Talbot v. Marshfield*, L. R., 3 Ch. Ap. 622.) In cases in which the question of advancement has been before the Court, it has frequently broken

'in the world of my said son. I further empower my said trustees
'or trustee, if they or he shall think it advantageous so to do,
'at any time or times, with the consent in writing of my said
'wife, whether covert or sole; and after her decease, and during
'the minority of my said son, in the discretion of my said
'trustees or trustee, to sell my said real estate or any part
'or parts thereof. And I direct that my said trustees or trustee
'shall invest the moneys to arise from the sale thereof in the
'manner hereinbefore directed concerning the moneys to arise
'from my residuary personal estate; and shall hold the funds or
'securities whereon such investment shall be made upon the
'trusts hereinbefore contained, concerning the funds or se-
'curities whereon the produce of my residuary personal estate
'may be invested. I declare that my said trustees or trustee
'shall have a discretionary power to postpone, for such period
'as to them or him shall seem expedient, the conversion or
'getting in of any part of my residuary personal estate which
'shall at my decease consist of shares in public companies, or of
'stocks, funds, or securities of any description whatsoever; but
'the outstanding personal estate shall be subject to the trusts
'hereinbefore contained concerning the moneys and funds and
'securities aforesaid, and the yearly proceeds thereof shall be
'deemed annual income for the purposes of such trusts. I de-
'vise all real estates which shall at my decease be vested in me
'as trustee or mortgagee, to my trustees hereinafter named,
'subject to the equities affecting the same respectively. I em-
'power the trustees or trustee for the time being of my will, to
'give receipts for all moneys, stocks, funds, shares, and effects,
'to be paid, transferred, or delivered to such trustees or trustee
'by virtue of my will, and declare that such receipts shall
'exonerate the persons taking the same from all liability to see
'to the application or disposition of the money or effects therein
'mentioned, and as to any purchaser from enquiring into the
'necessity for or propriety of any sale or sales purporting to be
'made under the powers of this my will. I declare that a new
'trustee or new trustees of my will may from time to time be
'appointed by my said wife during her life, by writing, under
into the capital of a child's share for the purpose of his advancement.
(*Walker v. Wetherell*, 6. Ves. 473.)

'her hand, and subject as aforesaid in the manner prescribed by law. I appoint my friends James Chaplin of 13 Rook Street, Westminster, Esquire, and Timotheus Clarke, of Ivy Lodge, Hampstead, Esquire, to be trustees of my Will; and I appoint my said wife Jane, and the said James Chaplin, and Timotheus Clarke to be executrix and executors of my will and guardians¹ of my said son James Hastings Brown during his minority. Lastly, I revoke all other wills. In witness, &c.'

In his 'Handy Book on Property Law,'² Lord St. Leonards says, speaking of the 20 & 21 Vic. c. 77—amended by 21 & 22 Vic. c. 95,—'The Act which abolishes the old jurisdiction, and establishes a new Court of Probate, with District Courts, and a limited jurisdiction in the County Courts, provides not only for the custody of your will after death, but directs that convenient depositories shall be provided, under the control of the Court, for all such wills of living persons as shall be deposited therein for safe custody; and that all persons may deposit their wills in such depository, upon payment of such fees, and under such regulations, as the judge of the Court shall by order direct. If you are likely, from time to time, to alter your will, I should advise you not to place it in this depository, for the will deposited must remain there until after your death. Nor can you place it in the custody without both trouble and expense. If I were a devisee of a living testator, I should like to hear that the will was in the new depository. The expense and difficulty occasioned by the deposit would deter many men from capriciously altering their donations.'

See 17 & 18 Vic. c. 113, and 30 & 31 Vic. c. 69, as to administration.

¹ As a minor cannot make a will (see 26 Vic. c. 1, s. 7), if a father, he cannot by will appoint a guardian to his children. He may, however, do so by deed. (12 Car. II. c. 24, s. 8. See *Eastwood*, p. 239, n. [g].)

² p. 261.

Executors and Administrators.—By 20 & 21 Vic. c. 77, s. 3 (the Court of Probate Act, 1857), it is enacted that ‘The *voluntary* and *contentious* jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other Courts and persons in England, at the passing of the Act, having jurisdiction or authority to grant or revoke probate of wills or letters of administration of the effects of deceased persons, shall in respect of such matters absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such Court or person’; and by s. 4, that ‘The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons, now vested in or which can be exercised by any Court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in Her Majesty; and shall, except as hereinafter is mentioned, be exercised in the name of Her Majesty, in a Court to be called the “Court of Probate,” and to hold its ordinary sittings, and have its principal registry at such place or places in London or Middlesex as Her Majesty in Council shall from time to time appoint.’

By the Court of Probate Act, 1858, it is enacted (s. 19), that ‘From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal effects and estate of such deceased person

shall be vested in the Judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary.' When, then, a person dies, either testate or intestate, no one is justified in intermeddling with his affairs till sanctioned by the Court of Probate. Any one who does so is styled an *executor de son tort*, and is liable accordingly.

We have, then, to enquire how the necessary sanction is obtainable, whether in the case of one dying intestate, or in that of one dying testate, together with the rights and duties of the person so authorised. For the sake of brevity, it may be here observed that both administrators and executors are trustees; and, as such, the rights and duties devolving upon trustees in general attach to them, such rights and duties being merely modified by the peculiar nature of their trust.

Administration and Probate.—By the interpretation clause to the Probate Act, 1857 (s. 2), it is enacted, that 'In the construction of this Act, unless the context be inconsistent with the meaning hereby assigned, "*will*" shall comprehend "*testament*," and all other testamentary instruments, of which probate may now be granted; "*administration*" shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for *general, special, or limited purposes*; "*Matters and causes testamentary*," shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration; "*Common form business*" shall mean the business of obtaining probate and administration where there is

no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.'

The business of the Court of Probate is thus divided into two distinct branches—viz., the *non-contentious* or *common form business*, and the *contentious business*. In one sense, each is a matter of procedure. In the sense, however, in which the word procedure is used, and is to be understood when dividing law into two branches, viz., substantive and adjective law—the adjective law embracing the law of evidence and procedure,—the word procedure implies the *modus operandi* necessary to the enforcing of a *secondary right*, involving the idea of some *primary right* broken. In this sense, then, it can hardly be said that, in strictness, either branch of the business of the Probate Court belongs properly to procedure; for, speaking generally, the contentious business of that Court is nothing else than the settlement of rival claims to a *new possession*, the right to appropriate which is the matter in dispute. As, however, the mere fact of dispute casts upon the judge the duty of determining the dispute, and as he can only do this according to the rules of evidence applicable to ordinary litigation, it appears but reasonable, while referring to the *common form* business in this work, to postpone the consideration of the *contentious* business, till in the exposition of the principles of the Adjective Law we have laid the neces-

sary foundations upon which our observations respecting it must rest.

By s. 29, it is enacted, 'That the practice of the Court of Probate shall, except when otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit according to the present practice, in the Prerogative Court.'

When the deceased has died, either not having made a will, or having made one that is invalid, letters of administration of his personal estate are, by 31 Edw. III. c. 11, directed to be granted to the next and most lawful friends; by 21 Hen. VIII. c. 5, s. 3, 'to the widow, or to his next of kin, or to both.' By the Common Law, confirmed by 29 Car. II. c. 3, s. 25, the husband has a right to a grant of administration to his deceased wife's personal estate; and, by the 22 & 23 Car. II. c. 10, and 1 Jac. II. c. 17, the relations—not next of kin—having distributive shares, *jure representationis*, and all persons having a cognizable beneficial interest in the intestate's estate, even creditors, may become grantees on the renunciation of the *potiores*.¹

The applicant for administration must depose to his qualification or interest, and, being accepted, must take an oath of office.

¹ Preference is given to the following persons, and in the following order; viz., to—(1) Husband or wife; (2) Child or children; (3) Grandchild or grandchildren; (4) Great-grandchildren or other descendants; (5) Father; (6) Mother; (7) Brothers and sisters; (8) Grandfathers or grandmothers; (9) Nephews and nieces, uncles, aunts, great-grandfathers or great-grandmothers; (10) Great-nephews, great-nieces, cousins-german, great-uncles, great-aunts, great-grandfather's father, &c.; all of the same degree, being entitled equally.

N.B.—In matters of distribution and succession to personal estate, the degrees of relationship are computed according to the *Civil Law*. *Locke v. Lake*, 2 Lee, 421. See *ante*, p. 531, n.)

By *Rule 37* (1862), it is directed, that the oath of administrators, and of administrators with the will, is to be so worded as to clear off all persons having a prior right to the grant; and the grant is to show on the face of it, how the prior interests have been cleared off; and the oath is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. And *Rule 47* directs that the usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the registry.

In the case of testacy, the executor of the will is *potior jure* as regards the administration of his testator's estate. Nor has the Court any power to withhold probate from him,¹ unless he is *non compos mentis*, or, being resident out of the United Kingdom at the time of the testator's decease, it shall appear to the Court necessary or convenient to make a grant of administration—with the will annexed—to some other person.² But though the Court has no right, except as above, to reject the nominee of the testator, it is necessary that the executor should have a *judicial recognition*, and be invested with a legal authority greater than that which could be conferred by the testator.

The acquiring of this recognition and authority is styled *proving the will*. The *modus operandi* is simply

¹ Accordingly, where an executor, being also residuary legatee, cut off a part of a will containing legacies, and thereby attempted to put £500 into his own pocket, and which attempt at fraud he admitted, the Court held that it had no option but to decree probate to him with his co-executor. (*In the goods of Mary Hett*, 6 *Jurist*, p. 350.)

² See *Evans v. Tyler*, 2 *Robertson*, p. 131; *Probate Act*, 1857, sec. 73.

right, which he can enforce in a court of law; it has constituted him a trustee, and thereby made him answerable to the Courts of Equity. It must not, however, be supposed that the Judge of the Court of Probate is, therefore, *functus officio*. It may prove necessary for the Court to revoke its grant; for example, if the grant has been obtained by actual fraud,¹ or by a false suggestion, though innocently made,² or, when properly obtained, it has subsequently become inoperative.³

For further information upon the various subjects sketched in this volume, the reader is referred to the text-writers and cases quoted in connection with each.

¹ For example, if an executor, being a *minor*, obtains probate on the suggestion that he is of full age (*see Coots*, p. 165); or if an executor obtains probate of a will made by a *feme covert*, on the suggestion that she was a *widow* at the time of making it (*Alicia Gill*, 1 *Hagg. E. R.* 341).

² For example, if an executor obtains probate of the will of a person still living whom he believed to be dead (*Charles James Napier*, 1 *Phill.* p. 83), or where a will has been discovered after administration granted, or a later will discovered than that of which probate had been granted, or where administration has been granted to the elected guardian of the intestate's children, there being a testamentary guardian who had not renounced. (*Louisa Morris*, 5 *L. T. N. S.* 768.)

³ For example, where one of two executors proves a will, and subsequently becomes lunatic. (*J. Marshall*, 1 *Curt.* 297.)

APPENDICES.



APPENDIX A.

HISTORICAL SKETCH OF THE PROGRESS OF THE LAW OF PRIVATE PROPERTY, TRACING THE GRADUAL ASSIMILATION OF REAL TO PERSONAL PROPERTY IN RESPECT OF ITS ALIENABILITY.

IN the Institutes of English Public Law, I had occasion to refer to the changes introduced into our institutions upon the accession of William of Normandy. Such reference, however, bore mainly upon the public branch of our law. I here propose, as briefly as possible, to direct the reader's attention to the effect of that accession upon our law of private property.

The questions to be considered appear to be these:—

(1) Did the accession of William of Normandy to the throne of England produce any change in the law of private property; and, if yes, what? And (2), Was that change permanent; and, if not, how and when was it modified? The answer to these two questions depends largely upon the answer that is given to another; viz., Did the system known as that of '*feudal tenure*,' exist in England prior to the Conquest; and, if so, to what extent? Or, was it introduced at the time of the Conquest, or as a result of it; and, if so, was its introduction general, or only partial? This, again, in its turn,

demands an answer to the question—What is to be understood by the term ‘feudal tenure’? To the answer to this last question we must first direct our attention.

That land was held by the subject, prior to the Conquest, upon some kind of tenure, and that that tenure was not *sovereign*, is obvious. The object of our enquiry being to determine whether or not it was held upon what is termed ‘*feudal tenure*,’ it is necessary either to define ‘*feudal tenure*,’ and see whether pre-Norman tenure can be said to be brought within that definition, or to state and define the various kinds of tenure with which we are acquainted, and to determine whether the facts known bring pre-Norman tenure within either, and which of them. Tenures have by our law writers been commonly divided into two generic classes; viz., ‘allodial tenure,’ and ‘feudal tenure,’ the latter being subdivided into *knight-service tenure* and *socage tenure*.

‘Allodial’ or ‘allodial land’ or ‘allodium,’ has been defined to be a patrimonial estate, a holding of lands in absolute possession, without acknowledging any superior lord, contra-distinguished from feudal lands which are held of superiors.¹

Mr. Wright² defines an allodial estat to be ‘an estate free from all tenure’; he says, ‘It is so called—in opposition to fees *conditional* at Common Law, and *fees-tail* since the Statute of Westminster 2nd, De Donis—as importing a simple inheritance clear of any condition, limitation, or restriction to any particular heirs, and descendible to the heirs general, whether male or female.’

¹ See Wharton’s Law Lexicon.

² Tenures, p. 147.

Mr. Hallam¹ says, 'The word *alodial* is sometimes restricted to such estates as had descended by inheritance. These were subject to no burden, except that of public defence. They passed to all the children equally, or, in their failure, to the nearest kindred.'²

We are told by Sir E. Coke that there are not any allodial lands in England. ³He might have added, 'and never were,' as the term *allodial* is here first defined.

The expression, 'holding of land in absolute possession without acknowledging any superior lord,' appears to me utterly unintelligible as applied to the holding of a subject. Lands 'held in absolute possession without acknowledging any superior lord,' are lands held in *sovereignty*; such holding being precisely that which constitutes sovereignty. To say that 'allodium is any subject's land that is not holden,' is pure jargon, and a flat contradiction in terms. If a subject has lands, they must be holden. A person who has lands that are not holden, is *sovereign*.

Mr. Serjeant Wright⁴ says, 'Tenures by knight-service differed very little from *proper feuds*; they were purely military, and genuine effects of the feudal establishment in England. The services were occasional, though not altogether uncertain, as in *proper feuds*.'

And again, 'Tenures in socage are holdings by any certain conventional services that are not military.'⁵

¹ Middle Ages, vol. i. c. 11, part 1.

² Alodial lands are commonly opposed to beneficiary or feudal; the former being strictly proprietary, while the latter depended upon a superior. In this sense the word is of continual recurrence in ancient histories, laws, and instruments. It sometimes, however, bears the sense of *inheritance*, and this seems to be its meaning in the famous 62nd chapter of the Salic law, *De alodis*. (Hallam, M. A. *ibid*.)

³ See Co. Lit. 93, a.

⁴ Tenures, p. 140.

⁵ Tenures, p. 142.

We are therefore driven to enquire more closely into the meaning of the word 'feud.' Mr. Wright,¹ adopting the view of Mr. Somner, says, 'feud' is a German compound, which consists of *feh*, *feo*, or *feoh*, signifying a salary, stipend, or wages, and of *hade*, *head*, or *hode*, importing quality, kind or nature; so that, says he, *feudum*, *fees*, or land holden in *fee*, is no more, considered in its first and primary acceptation, than what was holden in *feehode*—by contraction, *feud* or *feod*—i. e., in a stipendiary, conditional, mercenary way and nature, with the acknowledgment of a superior, and a condition of returning him some services for it, upon the withdrawing whereof the land was revertible unto the lord.²

¹ Tenures, p. 4.

² 'To manifest the truth of this assertion, it is necessary to take a short view of the origin of feuds, which were a military policy of the northern conquering nations, devised as the most likely means to secure their new acquisitions, and were large districts or parcels of land, given or allotted by the conquering general to the superior officers of his army, and by them dealt out in less parcels to the inferior officers and most deserving soldiers. These allotments or portions of victory naturally engaged such as accepted them to defend them, and as a part could not be preserved independent of the whole, all givers as well as receivers were mutually and equally concerned to defend the whole; but as that could not be done in a tumultuary way, order, and to that end a military subordination, was necessary; and, therefore, each receiver was supposed, in consequence of his acceptance of any portion, to oblige himself, as long as he held it, to attend to and enter into measures for the security and defence of the whole, whosoever he should be required by his benefactor or immediate superior, and was likewise supposed to be accountable to him as his commander or leader, for his attendance, and a faithful discharge of his duty; such benefactor or superior was likewise subordinate to and under the command of his benefactor, and so upwards to the prince or chief himself. Thus a proper military subordination was naturally and rationally enough inferred and established; and an army of feudatories were so many stipendiaries always on foot, ready to muster and engage in the defence of their country; so that the feudal return of fealty, or mutual fidelity and aid, were not originally *ex pacto*, but seem to have been politic or rather natural consequences drawn from the apparent necessity these warlike people were under, of maintaining their ground with the same spirit and by the same means they had got it. But as the princes of Europe were every day more and more alarmed by the progress of the northern standard, many of them went into this or a like policy as the

Mr. Selden, speaking of times long prior to the Conquest, says, '*Feuds* or *feuda*, being the same which in our law we call *tenancies* or *lands held*, and *feuda* also, are possessions so given and held that the possessor is bound to do service to him from whom they were given.'¹ 'This service was originally purely military. These *feuds*, *fiefs*, or *fees*, were originally held at the will of the lord, after which it became customary to grant them *for one year certain*, and later on to make the grant *for life*. But, though not then hereditary, it was unusual, and even thought hard, to reject the *heir* of the former feudatory, provided he was able to do the services of the feud, and the lord had no just objection against him. His succession, however, appears to have been permitted only upon the payment by him of a *fine* or *acknowledgment*, styled a *relief*. Still later on, the grant was made to extend beyond the vassal, *e. g.*, to his sons, or such of them as the lord might name, the exact terms of the grant being rigidly adhered to. This system, known as the *feudal system*, originated with and was developed by the northern conquering nations of Europe, with whom it had attained its third stage—viz., its hereditary quality—before the battle of Hastings.'²

Stated roundly, the essence of the theory of feu-

strongest intrenchment; and in imitation of it, they, reserving the dominion or property of the lands they gave, parcelled out some of their own possessions or territories under an express fealty, engaging their beneficiaries or feudatories to make the like returns of fidelity and aid, as followed from the design and nature of our original feud; whence, the feudal obligations probably began to be considered as renders or services of render, calculated for the benefit of the proprietary, who was, in respect of the dominium or propriety remaining in him, from thenceforth called Dominus.' (*Wright's Tenures*, pp. 3—11.)

¹ Seld. Tit. of Honor, 273.

² Wright's Tenures, 5.

dalism is nothing more or less than lands held of a *monarch*, properly so styled. The sovereignty is assumed to be in a single individual. To that individual the entire territory is supposed to belong. By him it is supposed to be parcelled out to his subjects, his feudatories, in such quantities and upon such conditions as he thinks fit.

If we reject the term *allodial* altogether, as not descriptive of a subject's tenure of lands, or substitute for it the term *sovereign*, confining its use of course to the sovereignty, we may with advantage distribute the lands of the nation into three different classes, viz.:—

1. *Sovereign lands*, or such as were retained by the sovereignty.

2. *Military tenure lands*, styled by the Saxons *Thane-lands*,¹ and by the Normans *Knight-service lands*, or such as were granted by the sovereignty to individual subjects on the condition of military service.

3. *Socage lands*, or such as were granted by the sovereignty to individual subjects, upon conditions other than those of military service.

By thus distributing all the lands held by subjects, into two classes—viz., *military* and *non-military*—and taking for granted, what is obviously the fact, viz., that

¹ 'Thani lex est—Ut tria faciat pro terrâ suâ, expeditionem, burghbotam et burghbotam, et de multis terris majus landirectum. Thus, in English, the law touching a thane is, that, in respect of his land, he shall do three things—viz., military expedition, repairing of castles, and mending of bridges, and for more lands, to do more land duties, &c.' (*Spelman, Treat. of Feuds*, 17.) Mr. Selden, citing this law, says that the two last of these duties—viz., burghbota and burghbota—are the same that commonly occur in the Saxon reservations by the name of *arcis pontisque constructio* or *extractio*, and which, with the other, viz. *expeditio*, are together called in some charters to the Church of Canterbury *Trinoda necessitas*. (*Seld. Tit. of Hon.* 516; *Wright*, 74.)

both before and after the Conquest, certain lands were held upon military tenure; our proposition is reduced to a simple issue, viz., had pre-Norman—i.e., Saxon—military tenure the same incidents as Norman military tenure? One would have thought the general tenor of history too plain to have admitted of doubt upon this point, and indeed it is difficult to suppose the doubt to have arisen otherwise than by a confusion as to the sense in which the expressions 'feudal' and 'feudal system' have been used; some employing those terms as simply designating a *military tenure*, and others as designating that species of military tenure in vogue with the Normans, which, in order to its accurate description, should not merely be styled *Norman feudalism* in order to distinguish it from the feudalism of other European nations, but *Norman-English feudalism*¹ in order to keep that in existence here after the Conquest, distinct from that prevailing at the same period in Normandy, which, according to some historians, differed in points of vital import.

Mr. Wright says, 'The Lord Coke, the Judges of Ireland in the case of Tenures, Mr. Selden, Nathaniel Bacon, and others, are of opinion, that feudal tenures were not brought into England by the Conqueror, but that they were common among the Saxons. The Lord Hale, Mr. Crag, Mr. Somner, Sir Henry Spelman, and others, again, are of opinion that feuds were brought hither by the Conqueror, and that they were in his time first established among us.' However that may be, three facts appear to be admitted on all hands; viz.—

1. That, before the Conquest, there was, at all events as to the great bulk of the land, no practical distinction

¹ See Inst. P. L. p. 102.

between it and personal property as to the right of alienation, and that both were devisable by will.¹ This fact appears perfectly consistent with the nature of a military tenure such as that described as *Thane-lands*, but utterly inconsistent with our notions of *Knight-service* lands.

2. That between A.D. 1080 and A.D. 1086, a general survey of the kingdom was made by the order of William, the result of which was set forth in the Domesday Book; and

3. That shortly after the completion of this work—viz., by the 52nd of William I., A.D. 1086—it was enacted, that ‘Statuimus ut omnes liberi homines fœdere et sacramento affirmant, quod intra et extra universum regnum Angliæ, quod olim vocabatur Regnum Britannicæ, Willelmo suo Domino fideles esse volunt, terras et honores illius fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.’ ‘The terms of this law,’ says Mr. Wright,² ‘are absolutely feudal, and are apt and proper to establish that policy with all its consequences; for, first, it requires that all owners of land should expressly engage and swear that they would become vassals or tenants, and, as such, be faithful to William as their lord, in respect of the dominium, upon the then known feudal notion residing in a feudal lord; and, secondly, that they would, in consequence of their becoming his vassals or tenants, everywhere faithfully maintain and defend his (their lord’s) territories and title, as well as person, and give him all possible aid and assistance against his enemies, whether foreign or domestic.’

¹ Wright’s Tenures, p. 172.

² Tenures, p. 66.

No enactment could, it is true, be more general in its terms than this; the expression 'omnes liberi homines' admits of no exception. We are, however, told that, 'Except as to lands in Kent, certain ancient boroughs, and a few manors, which by special indulgence were permitted to retain their Saxon rights, the feudal system was extended to the whole land of England, at least at the date of this enactment.'

The reader may possibly be of opinion, that the language of the enactment does not warrant Mr. Wright's suggestion that it is essentially and necessarily *feudal*. He may think that such language might, with equal propriety, have been used by any king *de facto*, or by the sovereignty of any country, whether autocratic or democratic, and that it is no more applicable to one species of tenure than to another; the real gist of the enactment being, that all who held lands, and however they held them, should swear allegiance to the king *de facto*, who in this instance claimed also to be king *de jure*.

In the absence of positive information, I incline to the belief that the general introduction of feudalism into England may be explained as follows:—

1. That William, having possessed himself of the *demesne*, or royal lands, not unnaturally introduced, as to those lands, the system with which he was familiar, viz., Norman feudalism.

2. That, in all cases of dispossessed Saxons, he gave their lands either to Normans or Saxons, as the case might be, upon the same terms; and that, in fact, a large portion of the land of the country, though not so large a portion as is commonly supposed, changed hands during his reign.

3. That his Parliaments, advisers, and principal lawyers were Normans, and that, so far as their influence extended, it necessarily favoured Norman institutions ; but

4. That, as to the lands retained by Saxons, by no means insignificant, no change was then effected tending to alter its character as private property.¹

5. That, side by side, different laws were administered, as the administrator happened to be Norman or Saxon.²

6. That no uniformity was even attempted until the introduction of *itinerant justices*, i. e., till A. D. 1176, and that general uniformity was not established till the reign of Edward I.

7. That complete uniformity of tenure never has been established in England,¹ Gavelkind and Borough English lands having retained their pre-Norman incidents ; and

8. That during this period—i. e., between the reigns of William I. and Edward I.—the foundation of feudal tenure, where existing, had been seriously undermined ; to such an extent indeed that, though it existed in theory, many of its fundamental principles were systematically ignored : hence the *Mortmain Act*, of 1279, the *De donis conditionalibus* of 1285, and the *Quia emptores terrarum* of 1290, to each of which we may devote a few words.

Before doing so, however, I would direct attention to another and kindred subject, viz., the origin of English *trusts of land*, and to the mode of reasoning that suggests itself as equally applicable to the two

¹ See Statute of Acton Burnell, *post*, p. 581.

² See Institutes of Public Law, p. 100 *et seq.*

points—viz., the introduction of *feudal tenure*, and the origin of *trusts of land*.

Origin of English Trusts of Realty.—It is not uncommonly supposed that the origin of *trusts* should be dated, in our legal history, from the reign of Henry VIII., and that they are in fact the offspring of *uses*, the origin of which is assigned to the fourteenth century. Indeed, from the general language of our writers, the reader could scarcely fail to derive this impression. That such an idea is utterly erroneous, when applied to trusts generally, cannot be doubted by any one who reflects upon the natural incidents of property. By the expression '*natural incidents*,' must be understood those incidents that attach to property under every legal system, however primitive or advanced, and whatever may be the idiosyncrasy of that system. That *land*, however, should be regarded in a light different from other subjects of property, is, to say the least, not unnatural; and that land should be regarded in different lights, at different periods of a people's history, is no other than the necessary consequence of the characteristic features of those different periods. In a thinly populated country, bordered by warlike neighbours, it is scarcely conceivable that the land should be held otherwise than on condition of the holder, in proportion to his holding, rendering military aid in the preservation of the State. In short, such a community is essentially an army of soldiers, each relying for support upon the produce of the soil appropriated to and defended by himself. In a densely populated country, a different condition of things is equally natural; a small fraction of the community being sufficient for its belligerent purposes, the opportunity is afforded for

men to select and follow those pursuits most congenial to their tastes. Agriculture, commerce, trade, and war become distinct professions. The last being organized professedly for the benefit of the whole, is necessarily maintained at the cost of the whole. Each soldier, therefore, becomes a mercenary, each non-soldier a contributor to his support. So, again, as the military requirement of the community necessitates a large or small force, the burden of its maintenance is weighty or light.

As consistent with the first position, we have the idea of the warrior chieftain—the leader selected for his skill and daring, the idol of his band, whose will is law, in whom all repose their confidence, and to whom all look for protection and favour. Such is the autocrat, such his subjects. As consistent with the second position, especially in its more advanced stage, we have the idea of an impersonal head; we see the functions of the one distributed between and exercised by the many, the individual chieftain assuming a purely representative character. In such a state, each individual, as individual, is subject; as a fraction of the whole, he is, or may be, sovereign.

As the first position is essentially fortuitous, it is necessarily unstable. The circumstances that brought it into existence cannot endure. With unsuccessful leadership, the State is overthrown, while the successful leadership, that places it out of danger, by that fact alone, destroys the original bond of union.

Principles consistent in theory and practice with the original position, being equally inconsistent with the latter, must either be modified or abandoned; and, in

proportion to the rapidity or slowness of the change, remodelled or subverted.

It is with a mind alive to these considerations that the student, who wishes to become a master of English law, must approach his task; for our law is essentially a historic growth, having branches that cannot be comprehended without reference to their stock. Such is, in a peculiar manner, the case with our law of *tenures*, and our law of trusts in relation to realty, to the right understanding of which it is necessary to go back, in our legal history at least, to the date of the Conquest, in order to find a proper starting point. We now turn to the acts already alluded to.

Mortmain Act¹ (*De religiosis*, 7 Edw. I. A.D. 1279).

¹ By Domesday Book (A.D. 1085), it appears that there were in England 62,215 knights' fees, of which 28,015 fell into the hands of the Church. Between that date and A.D. 1279, the Church continuing to possess itself of more and more, alarm was excited, and the intervention of the legislature demanded accordingly; hence the 'Mortmain Act.' The term 'mortmain,' from *mortuā manu* or *dead hand*, signifies that land which had fallen into the hands of the Church—a corporate body—became dead to all entitled in reversion, the corporation being immortal.

Gifts of land to the Church, without the license of the Crown, were accordingly rendered illegal. By 15 Ric. II. c. 5 (1391), the like prohibition was extended to the case of all *lay fraternities* and *corporations*. Between A.D. 1391 and A.D. 1736, various other statutes were enacted relative to the same subject. By 9 Geo. II. c. 36, 1736, which was enacted, as the preamble states, *to prevent improvident alienations or dispositions of landed estates, by languishing or dying persons, to the disherison of their lawful heirs*, it is provided that no lands or hereditaments, or any money, stock, or other personal estate, to be laid out in the purchase of any lands or hereditaments, shall be conveyed or settled for any *charitable uses*, unless by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months, at least, before the death of the donor or grantor, including the days of the execution and death, and enrolled in the High Court of Chancery within six calendar months next after the execution thereof; and unless such stock be transferred six calendar months at least before the death of the donor or grantor, including the days of the transfer and death; and unless the same be made to take effect in possession for the charitable

—This Act provided, that no person, religious or other whatsoever, should buy or sell, or receive under pretence of a gift or lease, or by reason of any other title whatsoever; nor should, by any act or ingenuity, appropriate to himself any lands or tenements *in mortmain*, upon pain that the immediate lord of the fee, or, on his default for one year, the lord's paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.'

This Act, which was an extension of the provision of the Magna Carta of Henry III., making all gifts to religious bodies void, and the land forfeited to the lord of the fee, at once proves, as does its predecessor, not merely that the *theory* that 'feudal lands must be held on the condition of feudal services, and cannot be so alienated as to destroy their feudal incidents,' had been discarded, but that such lands must have been exten-

use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him. Sec. 2 declares this not to affect any *bona fide* purchase and sale for full and valuable consideration. Gifts to the University of Oxford or Cambridge, or the Schools of Eton, Winchester, or Westminster, are excepted. Sec. 3 declares that all other gifts to *charitable uses* shall be *void*. For the numerous classes of cases within the operation of this Act, see Roper's Legacies. By 52 Geo. III. c. 102 (1812), all *charitable donations* are required to be registered with the Clerk of the Peace of the county wherein the same are made, within twelve months after the making of the same. By 1 & 2 Geo. IV. c. 92 (1821), trustees of charities are enabled to exchange lands.

See 29 & 30 Vic. c. 57, entitled 'An Act to make further provision for the enrolment of certain deeds, assurances, and other instruments relating to Charitable Trusts'; 32 & 33 Vic. c. 110, entitled 'An Act for amending the Charitable Trusts Act; 33 & 34 Vic. c. 34, entitled 'An Act to amend the law as to the investment on real securities of trust funds held for public and charitable purposes; 35 & 36 Vic. c. 24, entitled 'An Act to facilitate the incorporation of trustees of charities for religious, educational, literary, scientific, and public charitable purposes, and the enrolment of certain charitable trust deeds. (See *Corbyn v. French*, *Tudor's L. C.* 456.)

sively so alienated, indeed to such an extent as to demand the intervention of the legislature. The prohibition to alienate *in mortmain* was not, however, peculiar to the Normans, for our Saxon forefathers, who are said to have kept a jealous eye upon clerical rapacity at least sixty years before the Norman Conquest, prohibited the alienation of lands to corporations without the license of the Crown.¹

It is a fact worthy of note, that the largest and most considerable dotations of religious houses without license, happened within less than two centuries from the Conquest.² That is to say, at the very time when it is commonly supposed that the feudal notion of the inalienability of land without the concurrence of both lord and tenant, was at its prime in this country.

De Donis Conditionalibus (13 *Edw.I.c.* 1, A.D.1285).—This Statute enacted, that the will of the giver, according to the form in the deed of gift manifestly expressed, be henceforth observed; so that they to whom the land is given under such condition, shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it is given after their death, or shall revert unto the giver or his heirs, if issue fail, or there is no issue at all. And if a fine be levied hereafter upon lands so given, it shall be void in the law.

Here, again, we have legislative interference to put a stop to a common violation of the feudal principle that *loans* and not *gifts* of lands are to be presumed, and therefore, that when a grant is made to A. and the heirs of his body, a loan merely to A. for life was in-

¹ Selden, Jan. Angl.

² See Steph. Com. i. 456.

tended. Simple and well understood as was this feudal principle, the then courts were not reluctant to favour attempts to alienate in violation of it. They held that such a grant was a *conditional fee*; that the condition was satisfied by the fact of issue; and therefore, that, upon the birth of issue, the grantee's estate was converted from an *estate-tail* into a *fee-simple*. They held that a fee-simple might be alienated at pleasure. Thus did the lawyers of those days repudiate the feudal theory of fees being mere conditional tenancies; nay, more, they held the birth of a child to be the father's justification for depriving both him and his benefactor of their rights.

Quia Emptores (18 *Edw. 1, st. 1, c. 1, A.D. 1290*).—By this Statute it is enacted, 'That from henceforth it shall be lawful for every freeman to sell at his own pleasure his lands or tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the same chief lord of the fee, by the same services and customs as his feoffor held them before.'

Here, then, we have the legalisation of practices theretofore illegal, but evidently too common to admit of suppression. The legislature contented itself with the imposition of a condition, viz., that the purchaser, whoever he might be, should hold his lands, subject to the same conditions as his vendor. This act, therefore, in effect, admits what is now understood as the absolute dominium in land and the right of alienation; but put, or was intended to put, an end to *sub-infeudation*. It is, consequently, the commonly received notion that no *manor* is of more recent date, i.e., that no manor has been created since the year A.D. 1290. The utter disregard of the then existing law, however, indicated by

these statutes, may fairly suggest the supposition that obedience to the amended law was not implicit. Nor must the fact be overlooked that the statute in no way affected the Crown, which may, therefore, have created many manors at dates long subsequent to the Act.

The practical effect, however, of these three statutes may be stated thus :—(1) That holders in fee might, in the year A.D. 1290, give or sell their lands at pleasure, provided such alienation was not to a corporation, religious or secular, for in such case the license of the Crown could not be dispensed with ; and (2) That the owner of a less interest than the fee might dispose of that interest, but of that only ; that is to say, the grantee of an estate tail might dispose of his own interest, but could not defeat the rights either of the heirs of his body or of the reversioner.

Uses.—It is said that about the close of the reign of Edward III. a subtle distinction between land itself, and the use or profit of the land, was devised by the clergy as a means of evading the Statutes of Mortmain.¹ I incline rather to the belief that it was at or about this period that the courts began to uphold an old established illegal practice, and that they based their justification on this fiction. The reader will not forget, that at that period, and for long after, a simple gift of lands to a person and his heirs, styled a feoffment, accompanied by livery of seisin—i.e., by delivery of the possession¹—was all that was necessary to convey to that person the fee-simple in such lands. No consideration was necessary. The mere gift perfected by

¹ See *ante*, p. 573.

delivery of possession, was at law a binding and irrevocable transfer. Whether, therefore, land was given or sold, the law looked solely to the *livery of seisin* as the proof of title in the transferee, and did not trouble itself as to the motive or consideration. When, however, the distinction between *land* and its *use* was introduced, or, as already suggested, recognised, the Judges of the Court of Chancery—not the Common Law Judges—held that the mere fact of the *delivery* of possession did not show that the feoffee was entitled to the *use* or *fruits* of the land. They accordingly admitted evidence of the feoffor's intention, and compelled the feoffee to hold the land *to the use* of the person or persons intended to be benefited, who, according to the generally accepted notion, were clerical corporations, and who were by this means enabled to possess themselves of lands in contravention of the Mortmain Acts.

Again, the element of intention being recognised, independently of the transfer of the land, it was obvious that, though the land was transferred to one, the use of it might not merely be given to another, but that it might be transferred from person to person; for instance, the use could be given to one, say for ten years, or till the happening of a given event, after or upon which the use might be transferred to another. The intention or desire of the feoffor could thus be expressed in his *will*; and in this way land, which was not legally *devisable* till the reign of Henry VIII., was, in fact, devised by the devising of the *use* of it.

That so miserable a subterfuge should have been suffered to succeed as a means of deliberately violating

the law, can only be explained by the fact that public opinion favoured, not to say demanded, more ample proprietary rights than the law then granted, and that the judges who had the control of testamentary matters, whether from being clerics, winked, as it is suggested, at the illegality of acts which tended to enrich the Church, whose interests they identified with their own as paramount; or, as is more reputable and probable, stretched many a point in favour of the growing tendency to assimilate real to personal property in respect to its alienability. Those who are pleased to depict the imagined death-bed scene of the wealthy landed proprietor; to paint him whispering into the ear of his confessor the narrative of his mis-spent life; to draw the wily priest suggesting a purgatory, hinting the price of escape from its torments, and introducing the witness to the contract for prayers, the consideration being the disherison of his blood,—may, if they believe this version of the matter, add with consistency, ‘What mattered it what might be the consequence to the dead man’s family, so long as the priest was satisfied? The gift was made, and the clerical judge whose boast it was that he administered *equity*, acting in *foro conscientiæ*, was as deaf to the cries of the widow or orphans as to the command of the law, that land should not be alienated to the Church without the license of the king.’ Those who do not take this view might, with no less propriety, and perhaps with equal justice, paint the death-bed of the fond father of a numerous family. They might depict him in eager commune with his attorney, his eyes glistening with delight as he realized the scheme by which, without beggaring his eldest, he might provide for his younger children by placing his

lands in trust, to pay each an annual sum sufficient to keep them from want; in which case, without loading the judge, who should endeavour to give effect to the paternal wish, with obloquy, one might regret the then condition of the law, which rendered subterfuge necessary to enable a man to obey his natural instincts.

No doubt, the machinery applicable to the one purpose was applicable, and perhaps not unfrequently applied, to the other. Nor is it to be doubted that superstition then, as at all times, induced men, in the name of heaven, to commit deeds that disgrace mankind. Whatever the motive, this is certain, that *feoffments to uses* and *bequests of uses* were held by our Courts of Chancery to be equity; and Common Law Judges, who appealed to the statute, were directed to the distinction between *land* and the *use* of it.

It so happened that this doctrine of uses was equally applicable to other interests beside those already indicated. England was then approaching troublesome times. In 1399 Richard II. was deposed; and, not long after, the two great houses of York and Lancaster laid their respective claims to the throne. Treason worked a forfeiture of lands. The fact of treason or no treason was, of course, determined by the fortune of the field. What, then, was more reasonable, than that men who were about to risk the hazards of battle, should enfeoff some less warlike friend of their lands to the use of themselves and their children, so that, in the case of banishment or death, they might preserve the fruits thereof to themselves or to their children? To another class, also, this equitable doctrine proved most acceptable, viz., to those who took

less delight in payment than in purchase. By the Common Law, the lands of a debtor could not, as against himself, be taken in execution in an action of debt, but as against his heir they might.¹ The inconvenience of this principle attracted attention at an early date.

In the year 1283, by the Statute of Acton-Burnell, *De Mercatoribus* (11 Edw. I.), it was enacted, that 'The *chattels* and *devisable burgages* of the debtor might be sold for the payment of his debts;' and in 1285, by the Statute of Westminster 2nd (13 Edw. I. c. 18), it was enacted, that 'When a debt is recovered, or acknowledged, or damages adjudged in the King's Courts, the plaintiff shall have his election, either to have a writ of *Fieri facias*, or else that the sheriff shall deliver to him all the *chattels* of the debtor, saving only his oxen and beasts of the plough, and also *one-half of his lands*, until the debt be levied upon a reasonable price or extent.'² Accordingly, to avoid the inconvenience of compulsory honesty, debtors likewise are said to have availed themselves of this doctrine, by infeoffing others of their lands to their own use.

The result of this doctrine, and its various applications, was, that most of the lands in the kingdom were conveyed to uses, and the state of things brought into existence that is described in the preamble to the Statute of Uses.³

¹ Watkins, p. 443.

² See Index 'Elegit.'

³ 'Whereas, by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred, from one to another but by solemn livery and seisin, matter of record writing sufficient made *bonâ fide*, without covin or fraud, yet nevertheless divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometimes made by nude

Statute of Uses—(27 Hen. VIII. c. 10, A. D. 1535-6).

—By this statute it is enacted that, 'Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised; of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner or means whatsoever it be; that in every such case all and every such person and persons and bodies politic, that have or hereafter

parolx and words, sometimes by signs and tokens, and sometimes by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantily had any good memory or remembrance, at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose, indiscreetly and unadvisedly, their lands and inheritances, by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids pur fayre fitz chyvaler et pur file maryer, and scantily any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers; manifest perjuries by trial of such secret wills and uses have been committed, the King's highness has lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the use of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient Common Laws of this realm. For the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors, heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's Highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged, or hurt, by reason of such trusts, uses, or confidences, it may please the King's most Royal Majesty that it may be enacted that, &c.'

shall have any such use, confidence, or trust, in fee-simple, fee-tail, for term of life or for years or otherwise, or any use, confidence, or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons, that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have or hereafter shall have such use, confidence, or trust after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust, that was in them.'

The expressed object of this enactment was, as declared, to put an end to the evils recited in the preamble, which evils were supposed to be traceable to secret dispositions of the beneficial interest in land; this secrecy being the result of the theory which distinguished the *equitable* from the *legal* interest in land, holding that the one might exist in one individual, while the other was in another. The Statute of Uses was in fact intended to put a stop to *secret dispositions* of land, and to abolish the jurisdiction of the Court of Chancery over landed estates, by giving actual possession at law to the person beneficially entitled in equity.¹

¹ See Chudleigh's Case, 1 Coke's Rep. 283.

The operation of the statute was, however, greatly narrowed by the fact of use having been made of the word '*seised*.' Its actual effect was to import into the rules of law some of the then existing doctrines of the Court of Chancery, and to add to the language previously employed in a conveyance the three words—'*to the use*.'

The efforts on the part of the legislature, on the one hand, to correct existing abuses, and those of the lawyers and the Court of Chancery, on the other, to evade the statutes, are not the least remarkable feature of the times now under consideration.

Bargain and Sale.—Before the Statute of Uses, when a bargain was made for the sale of an estate, the Court of Chancery held, that from the moment of the payment of the purchase-money, the bargainer or vendor was *seised to the use* of the purchaser.¹ Upon the passing of the Statute, this *use* was converted by the Statute into the legal *seisin*, and thus by mere *bargain and sale* without *feoffment*, or even a *deed*, the legal fee-simple was passed secretly to the purchaser by the very enactment intended to render secret conveyances impossible.

Statute of Inrolments.—This defect in the Act being soon discovered, another Act was passed in the same year—27 Hen. VIII. c. 16—requiring every bargain and sale of an estate of *inheritance* or *freehold* to be made by *deed-indented*, which deed was required to be *inrolled* within six months of its date. A stop, it was supposed, was thus put to the secret conveyance by *bargain and sale*. Alas for human short-sightedness! the Statute of Inrolments spoke only of *estates*

¹ See 2 Sand. Uses, 43.

of *inheritance*, or *freehold*, it made no mention of a mere term of years.

Lease and Release.—Lord Norris, it is said, who wished to dispose in a particular manner of his estates, without the knowledge of some of his relations, suggested to Sir Francis Moore, that as the Statute of Inrolments only mentioned estates of *inheritance* or *freehold*, his desire could be effected by a *bargain and sale for one year* to B., which not being within the statute, could be made by mere word of mouth, and payment of the money, the *entry* required by the law being supplied by the Statute of Uses. B., the bargainee, was, in intendment of law, in actual legal possession of the term. Such being the case, it only remained for Lord Norris to *release* the fee to B., which he could do legally by *deed without inrolment*. Through this loop-hole, discovered by Lord Norris, a few having ventured and passed safely, the multitude followed, and for more than two centuries *lease and release* was the common means of conveying lands without *livery of seisin, entry, or inrolment*.

Trusts.—No Use upon a Use.¹—‘About the time of the passing of the Statute of Uses,’ says Mr. Watkins,² ‘some wise man, in the plenitude of legal learning, declared that there could not be *an use upon an use*. This very wise declaration, which must have surprised everyone who was not sufficiently learned to have lost his common sense, was adopted, and is still adopted; and upon it, at least, chiefly, has been built the present system of *uses and trusts*.’

We said, that one of the results of the Statute of

¹ See Tyrrell's Case, Tudor's L. C. 274.

² Principles of Conveyancing—Introduction, p. 20.

Uses was to add to a conveyance the three words '*to the use.*' If a feoffment was made '*to A. and his heirs, to the use of B. and his heirs,*' the Statute executed the use to B., and converted his *equitable* into the *legal* estate. Again, if the feoffment was made '*to and to the use of A. and his heirs,*' the *land* and its use being given to the feoffee, the Statute declared him to have the legal estate. If the feoffment was made '*to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs,*' or was made '*to and to the use of A. and his heirs, to the use of B. and his heirs;*' it being held, as already stated, that there could not be *an use upon an use*, what was to become of the *use* in these two cases, declared to be granted, in the one case to C., and in the other to B.? The Court of Chancery said, that it was inequitable that they, being the persons last-mentioned, should be deprived of the benefit intended by the feoffor; and so, upon the plea of doing equity, they assisted anyone who chose to add the words '*to the use,*' in the violation of the spirit of the law, by constraining the party to whom the law gave the estate, to hold it in *trust* for him to whom the *use* was last declared. Thus,¹ says Mr. Joshua Williams, arose the modern doctrine of *uses* and *trusts*; and hence it is, that if it is now wished to vest a freehold estate in one person, as trustee for another, the conveyance is made to the trustee, or some other person—it is immaterial which—and his heirs, to the use of the trustee and his heirs, in trust for the party intended to be benefited, called the *cestui que trust*, and his heirs. An estate in fee simple is thus vested in the trustee by force of the Statute of Uses, and the entire beneficial interest

¹ Real Property, p. 167.

is given over to the *cestui que trust* by the Court of Chancery.

Wills of Socage Lands.¹ (*Statute of Wills*, 32 Hen. VIII. c. 1, A. D. 1540).—By this Statute, it is enacted that, All persons having any manors, lands, tenements, or hereditaments, holden in *socage*, or of the nature of *socage tenure*, shall thereafter have full and free liberty, power, and authority to give, dispose, will, and devise the same, as well by his last will and testament in writing, as by any act or acts lawfully executed in his life, at his free will and pleasure.

Wills of two-thirds of Knight-Service Lands.—And by 34 & 35 Hen. VIII. c. 5 (1542-3), the Bill concerning the explanation of wills, it is enacted (s. 5), That all and singular person and persons, having a sole estate or interest in fee simple, or seised in fee simple in coparcenery, or in common, of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, or remainder, or of and in any rents or services incident to any reversion or remainder holden of the king in knight-service in chief, or of the nature of knight-service in chief, hath, &c., full and free liberty, power, and authority to give, dispose, will, or assign to any person or persons, except bodies politic and corporate, by his last will and testament, . . . TWO-THIRD PARTS, &c.; and (by s. 6), That the said will, so declared, shall be good and effectual for TWO-THIRD PARTS of the said manors, lands, tenements, and hereditaments, although the will, so declared, be made of the whole or of more than two parts of the same.

¹ The reader will not overlook the fact, that some if not all bur-gage lands had, long prior to this, been devisable. (*See the Statute of Acton-Burnell*, ante, p. 581.)

Feudal Tenures Abolished. (12 Car. II. c. 24, A. D. 1660).—By this Statute, it is enacted, That all tenures by knight-service, held of the king or others, and the fruits and consequents thereof, be henceforth taken away and discharged, and that all tenures of every sort be turned into free and common socage, save only tenures of frankalmoign, copyholds, and the honorary services of grand sergeanty; and that all tenures which shall be created by the king, his heirs, or successors, in future shall be held in *free and common socage*. But it is declared that the Act shall not take away any rent, heriot, or suit of Court incident to any tenure altered by that Act, or other services incident or belonging to tenure in common socage, or the fealty or distresses incident thereto.

APPENDIX B.

SKELETON OUTLINE OF A DEED, SHOWING THE COMMON RELATION AND POSITION OF CLAUSES.

*(The parts marked * appear in all Deeds.)*

This Indenture, made (**Date***) the day of
. . . . (**Parties***) Between A. B., of &c.
Esq., of the first part; C. D., of &c. of the
second part; and E. F., of &c. of the third
part: (**Recitals**) WHEREAS, by an Indenture, bearing
date &c. and expressed to be made be-
tween &c. it was witnessed that &c.
(**Operative Part or Testatum***) NOW THIS INDENTURE
WITNESSETH &c. (**Parcels**) ALL THAT &c.
(**General Words**) TOGETHER WITH &c. AND
ALL THE ESTATE, &c. (**Habendum**) TO HAVE
AND TO HOLD &c. (**Declaration of Uses**) TO THE
USE &c. (**Conditions**) UPON CONDITION . . .
. (**Declaration of Trusts**) IN TRUST
(**Reddendum, used where a rent is reserved**) YIELDING
AND PAYING &c. (**Provisoes, Decla-**
rations, or special Stipulations appropriate to the
particular transaction) PROVIDED ALWAYS, and it is
hereby agreed and declared, &c.
(**Covenants**) AND the said [covenantor] *doth* hereby
for himself, his heirs, executors, and administrators,
covenant with the said [covenantee], his heirs and
assigns, &c. (**Testimonium***) In witness
&c. (**Signatures***)

A.  B., C.  D., E.  F.

[See back, p. 590.]

(**Attestation Clause***) Signed, sealed, and delivered,
by the within-named A. B., C. D., and E. F., in the
presence of

JOHN BROWN, of Cork, Gentleman,
JAMES HUMBLE, Clerk to Mr. J. Brown.

(**Receipt¹**) Received, the day and year
first within written, of and from the within
named C. D., the sum of £ , being
the consideration within mentioned to be
paid by him to me. } £ - -

(Signed) A. B.

Witness :

JOHN BROWN.

JAMES HUMBLE.

¹ This receipt is for the pecuniary consideration, when there is one.

APPENDIX C.

ABSTRACT OF THE LAND TRANSFER ACT, 1875.¹

[38 & 39 VIC. c. 87.]

(To come into operation on 1st January, 1876.)

By this Statute it is enacted (sec. 2) that 'all lands in England, that are either *freehold lands*—customary freeholds which are unalienable without some act by the lord of the manor excepted—or *leasehold lands* held under a lease, either immediately or mediately derived from the freeholder, may be *registered* at the *Land Registry* to be established under the Act; and as to

FREEHOLDS.

It enacts (sec. 5) that (1) *Any person who has contracted to buy for his own benefit an estate in fee simple in land, and* (2) *Any person entitled for his own benefit*

¹ From and after the commencement of this Act, application for the registration of an estate under the Land Registry Act of 1862 shall not be entertained (sec. 125); but the Lord Chancellor may, by order, provide for the registration under this Act, without cost to the parties interested, of all titles registered under the Land Registry Act, 1862, and care shall be taken in such order to protect any rights acquired in pursuance of registry under such last-mentioned Act, and any order so made by the Lord Chancellor shall have the same effect as if it were enacted in this Act; nevertheless it shall not be obligatory on any person interested in an estate registered under the said Land Registry Act, 1862, to cause such estate to be registered under this Act, and until such estate is registered under this Act, the Act of 1862 shall apply thereto in the same manner as if this Act had not passed (sec. 126). See, as to the Act of 1862, 'A Manual of Practice in the Office of Land Registry, including the Acts, &c.,' by Henry Gough.

at law or in equity to an estate in fee simple in land, and (3) Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, may apply to the registrar to be registered, or to have registered in his stead any nominee or nominees not exceeding the prescribed number, as proprietor or proprietors of such freehold land with an *absolute title*¹ or with a *possessory title*² only: Provided, that in the case of land contracted to be bought, the vendor consents to the application.

(Sec. 7.) The first registration of any person as proprietor of freehold land, (in this Act referred to as first registered proprietor,) with an absolute title, shall vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and ap-

¹ Where an absolute title is required, the applicant or his nominee shall not be registered as proprietor of the fee simple until and unless the title is approved by the registrar. (Sec. 6.)

² Where a possessory title only is required, the applicant or his nominee may be registered as proprietor of the fee simple on giving such evidence of title, and serving such notices, if any, as may for the time being be prescribed. (Sec. 6.)

The registration of any person as first registered proprietor of freehold land with a possessory title only, shall not affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor; but, save as aforesaid, shall have the same effect as registration of a person with an absolute title. (Sec. 8.)

QUALIFIED TITLE.—Where an absolute title is required, and on the examination of the title it appears to the registrar that the title can be established only for a limited period, or subject to certain reservations, the registrar may, on the application of the party applying to be registered, by an entry made in the register, except from the effect of registration any estate, right, or interest arising before a specified date, or arising under a specified instrument or otherwise particularly described in the register, and a title registered subject to such excepted estate, right, or interest shall be called a qualified title; and the registration of a person as first registered proprietor of land with a qualified title shall have the same effect as the registration of such person with an absolute title, save that registration with a qualified title shall not affect or prejudice the enforcement of any estate, right, or interest appearing by the register to be excepted. (Sec. 9.)

purtenances belonging or appurtenant thereto, subject as follows:—(1) *To the incumbrances, if any, entered on the register; and (2) To such liabilities, rights, and interests, if any, as are by this Act declared not to be incumbrances;*¹ *unless, under the provisions of this Act, the contrary is expressed on the register; and (3) Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled, but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.*

¹ All registered land shall, unless, under the provisions of this Act, the contrary is expressed on the register, be deemed to be subject to such of the following liabilities, rights, and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights, and interests shall not be deemed incumbrances within the meaning of this Act; that is to say, (1) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges having their origin in tenure; and (2) Succession duty, land tax, tithe rentcharge, and payments in lieu of tithes, or of tithe rent-charge; and (3) Rights of common, rights of sheepwalk, rights of way, water-courses, and rights of water, and other easements; and (4) Rights to mines and minerals; and (5) Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals; and (6) Rights of fishing and sporting, seigniorial and manorial rights of all descriptions, and franchises, exerciseable over the registered lands; and (7) Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies:—Provided as follows: (a) Where it is proved to the satisfaction of the registrar that any land registered, or about to be registered, is exempt from land tax or tithe rent-charge, or from payments in lieu of tithes, or of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner; and (b) The Commissioners of Inland Revenue shall, upon the application of the proprietor of any land registered, or about to be registered, upon such declaration being made, or such other evidence being produced as the Commissioners require, and upon payment of the prescribed fee, grant a certificate that at the date of the grant thereof, no succession duty is owing in respect of such land; and the registrar shall, in the prescribed manner, notify such fact on the register, and

On the entry of the name of the first registered proprietor of freehold land on the register, the registrar shall, if required by such proprietor, deliver to him a certificate, in this Act called a land certificate, in the prescribed form; the certificate shall state whether the title of the proprietor therein mentioned is absolute, qualified, or possessory. (Sec. 10.)

LEASEHOLD LAND.

By sec. 11 it is enacted that a separate register shall be kept of leasehold land, and on and after the commencement of this Act any of the following persons—that is to say, (1) *Any person who has contracted to buy for his own benefit leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired; and* (2) *Any person entitled for his own benefit, at law or in equity, to leasehold land held under any such lease as is described in this section; and* (3) *Any person capable of disposing for his own benefit by way of sale of leasehold land held under any such lease as is*

such notification shall be conclusive evidence of the fact so notified in respect of succession duty; and (c) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is vested in the proprietor of land registered, or about to be registered, the registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals, as well as of the land; and (d) Where it is proved to the satisfaction of the registrar that the right to any mines or minerals is severed from any land registered, or about to be registered, the registrar may, on the application of the person entitled to any such mines and minerals, register him as proprietor of such mines and minerals in manner hereafter in this Act mentioned, and upon such registration being effected shall enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals.

Where the existence of any such liabilities, rights, or interests, as are mentioned in this section, is proved to the satisfaction of the registrar, the registrar may, if he think fit, enter on the register notice of such liabilities, rights, or interests in the prescribed manner. (Sec. 18.)

described in this section,—may apply to the registrar to be registered, or to have registered in his stead any nominee or nominees not exceeding the prescribed number, as proprietor or proprietors of such leasehold land, with the addition, where the lease under which the land is held is derived immediately out of freehold land, and the applicant is able to submit for examination the title of the lessor, of a declaration of the title of the lessor to grant the lease under which the land is held: Provided that, in the case of leasehold land contracted to be bought, the vendor consents to the application.¹

The registration under this Act of any person as first registered proprietor of leasehold land, with a declaration that the lessor had an absolute title to grant the lease under which the land is held, shall be deemed to vest in such person the possession of the land comprised in the registered lease relating to such land for

¹ Every applicant for registration of leasehold land shall deposit with the registrar the lease of the land in respect of which the application is made, or, if such lease is proved to the satisfaction of the registrar to be lost, a copy of such lease or of a counterpart thereof, verified to the satisfaction of the registrar; and such lease or attested copy is in this Act referred to as the registered lease.

Leasehold land held under a lease containing an absolute prohibition against alienation, shall not be registered in pursuance of this Act; and leasehold land held under a lease containing a prohibition against alienation without the license of some other person, shall not be registered under this Act until and unless provision is made in the prescribed manner for preventing alienation without such license by entry on the register of a restriction to that effect, or otherwise. (Sec. 11.)

An applicant or his nominee shall not be registered as proprietor of leasehold land, until and unless the title to such land is approved by the registrar; and further, if he apply to be registered as proprietor of leasehold land with a declaration of the title of the lessor to grant the lease under which the land is held, until and unless the lessor, after an examination of his title by the registrar, is declared to have had an absolute or qualified title to grant the lease under which the land is held. (Sec. 12.)

all the leasehold estate therein described, with all implied or expressed rights, privileges, and appurtenances attached to such estate, but subject as follows: (1) *To all implied and express covenants, obligations, and liabilities incident to such leasehold estate; and* (2) *To the incumbrances (if any) entered on the register; and* (3) *Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate and are by this Act declared not to be incumbrances in the case of registered freehold land; and* (4) *Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled, but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.* (Sec. 13.)¹

By sec. 15, it is provided that the lessor may be declared to have a qualified title to grant leases in certain cases; and, by sec. 16, that the registrar shall, if required by the proprietor, deliver to him a copy of the registered lease.

REGULATIONS AS TO EXAMINATION OF TITLE BY THE REGISTRAR.

By sec. 17, it is enacted that the examination by the registrar of any title under this Act shall be con-

¹ The registration of any person under this Act as first registered proprietor of leasehold land without a declaration of the title of the lessor shall not affect or prejudice the enforcement of any estate, right, or interest affecting or in derogation of the title of the lessor to grant the lease under which the land is held; but, save as aforesaid, shall have the same effect as the registration of any person under this Act as first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held. (Sec. 14.)

ducted in the prescribed manner; Provided that (1) *Due notice shall be given, where the giving of such notice is prescribed, and sufficient opportunity be afforded to any persons desirous of objecting to come in and state their objections to the registrar; and* (2) *The registrar shall have jurisdiction to hear and determine any such objections, subject to an appeal to the Court in the prescribed manner and on the prescribed conditions; and* (3) *If the registrar, upon the examination of any title, is of opinion that the title is open to objection, but is nevertheless a title, the holding under which will not be disturbed, he may approve of such title, or may require the applicant to apply to the court, upon a statement signed by the registrar, for its sanction to the registration; and* (4) *The registrar may accept as evidence recitals, statements, and descriptions of facts, matters, and parties in deeds, instruments, or statutory declarations not less than twenty years old.*

Sec. 19 provides for the cancelling of notices of incumbrances upon their being discharged; and sec. 20 provides as to the notification of the determination of registered leases.

By sec. 21, it is enacted that a title to any land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession; but this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

DEALINGS WITH REGISTERED LAND.

As to registered land, it is further provided that the registered proprietor may charge his land by way of mortgage, by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, to whom, if required, a certificate of the charge is to be furnished (sec. 22). There being no registered condition to the contrary, the registration of the charge shall create an implied covenant, binding upon the owner, his heirs, executors, and administrators, to pay the principal sum charged, together with interest, if any, at the appointed time and rate (sec. 23); and when the charge is created on leasehold land, a like implied covenant to pay rent, &c., and indemnify the proprietor of the charge (sec. 24), subject to the rights of prior incumbrances, and to the liability attached to a mortgagee in possession, the proprietor of the charge is, for the purpose of obtaining satisfaction of any moneys due to him under the charge, empowered to enter upon the land (sec. 25), to enforce a foreclosure or sale (sec. 26), or, having a power of sale, to exercise it (sec. 27).

Subject to any entry to the contrary on the register, registered charges on the same land shall, as between themselves, rank according to the order in which they are entered on the register, and not according to the order in which they are created.

The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge, and thereupon the charge shall be deemed to have ceased (sec. 28).

TRANSFER OF FREEHOLD LAND.

By sec. 29 it is enacted that the transfer by any registered proprietor of freehold land, either of the whole or part thereof, shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred; but, until such entry is made, the transferor shall be deemed to remain proprietor of the land. The transferee is entitled to a *land certificate*; and when part only of the land is transferred, the transferor is entitled to a *land certificate* containing a description of the land retained by him. Sec. 30 determines the estate of the transferee for valuable consideration of freehold land with absolute title; sec. 31, his estate in the case of qualified title; sec. 32, in the case of possessory title; and sec. 33, the estate of a voluntary transferee of freehold land.

TRANSFER OF LEASEHOLD LAND.

Sec. 34 provides that a transfer by the registered proprietor of leasehold land shall be completed by the registrar entering on the register the transferee as proprietor, as in the case of freehold land. It further enacts that, upon completion of the registration of the transferee, if the transfer includes the whole of the land comprised in the registered lease relating to such land, the transferee shall be entitled to the office copy of the registered lease; but if a part only is transferred, the registrar shall, if required, according to any agreement that may have been entered into between the transferor and transferee, deliver to the one the office copy of the registered lease and to the other a fresh office copy of such lease, each of such copies showing by

endorsement or otherwise the parcels of which the person to whom such copy is delivered is the registered proprietor.

Sec. 35 determines the estate of the transferee for valuable consideration of leasehold land, with a declaration of the absolute title of the lessor. Sec. 36 determines his estate in the case of a declaration of qualified title; sec. 37, in the case where there is no declaration of title; sec. 38, in that of the voluntary transferee; and, by sec. 39, it is enacted that on the transfer of any leasehold land under this Act, unless there be an entry on the register negating such implication, there shall be implied as follows: that is to say—(1) *On the part of the transferor, a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and* (2) *On the part of the transferee, a covenant with the transferor, that he, the transferee, his executors, administrators, or assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.*

Sec. 40 empowers the owner of any charge to transfer it by registration, and entitles the transferee to a

fresh certificate of charge. Secs. 41 to 47 provide for the transmission of land and charges in the case of death, bankruptcy, or marriage.

By sec. 48, it is enacted that sec. 5 of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act; and, instead thereof, it is enacted, that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of the Vendor and Purchaser Act, 1874, shall not apply to lands registered under this Act.

By sec. 129, that the 7th section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act.

UNREGISTERED DEALINGS WITH REGISTERED LAND.

By sec. 49, it is enacted that the registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled

to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition ; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.

This Act contains 129 sections ; those quoted and referred to indicate its object and general operation. The reader is referred to the Act itself, and its remaining sections, for its important details.

APPENDIX D.

REAL PROPERTY LIMITATION ACT.

[37 & 38 VIC. CH. 57.]

(To come into operation on 1st January, 1879. See Sec. 12.)

ARRANGEMENT OF CLAUSES.—1. No land or rent to be recovered but within twelve years after the right of action accrued. 2. Provision for case of future estates. Time limited to six years when person entitled to the particular estate out of possession, &c. 3. In cases of infancy, coverture, or lunacy, at the time when the right of action accrues, then six years to be allowed from the termination of the disability, or previous death. 4. No time to be allowed for absence beyond seas. 5. Thirty years utmost allowance for disabilities. 6. In case of possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them. 7. Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment. 8. Money charged upon land and legacies to be deemed satisfied at the end of twelve years, if no interest paid, nor acknowledgment given in writing in the meantime. 9. Act to be read with 3 & 4 Will. IV. c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this Act. 7 Will. IV. & 1 Vic. c. 28 to be read with this Act. 10. Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same. 11. Short title. 12. Commencement of Act.

WHEREAS it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. After the commencement of this Act, no person

shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received; notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent: But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve

years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind; then such person, or the person claiming through him, may notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited, shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after

the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry or to bring such action or suit, or of any person through whom he claims.

5. No entry, distress, action, or suit shall be made or brought by any person, who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates, to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such

rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be

more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the 3rd and 4th years of the reign of his late Majesty King William the Fourth, chapter 27, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered 2, 5, 16, 17, 23, 28, and 40 respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered 18, and the period of twelve years had been mentioned in the said

section 18 instead of the period of twenty years ; and the provisions of the Act passed in the session of the 7th year of the reign of his late Majesty King William the Fourth, and the 1st year of the reign of her present Majesty, chapter 28, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

11. This Act may be cited as the 'Real Property Limitation Act, 1874.'

12. This Act shall commence and come into operation on the 1st day of January, 1879.

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. The words printed in *Italics* refer to the *Analytical Index*, where the subject is elaborated.

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"as our language, compounded of British, Saxon, Danish, Norman customs.
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